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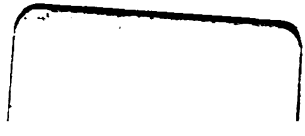

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

FOR THE

SEVENTH JUDICIAL CIRCUIT,

BY

JOSIAH H. BISSELL,

OF THE CHICAGO BAR.

OFFICIAL REPORTER.

VOL. VII.—1874—1878.

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JUDGES,

SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD COVERED BY THIS VOLUME.

HON. DAVID DAVIS,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

Alloted to the Seventh Circuit. Appointed December 8, 1862. Resigned March 4, 1877.

HON. JOHN M. HARLAN,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. Allotted to the Seventh Circuit. Appointed November 29, 1877.

HON. THOMAS DRUMMOND,

CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.

Appointed December 22, 1869. District Judge since February 19, 1850.

HON. SAMUEL H. TREAT,

DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,

DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.

Appointed December 21, 1869.

HON. HENRY W. BLODGETT,

DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

Appointed January 11, 1870.

HON. JAMES C. HOPKINS,

DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.

Appointed July 9, 1870. Died September 3, 1877.

HON. CHARLES E. DYER,

DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.

Appointed February 10, 1875.

HON. ROMANZO BUNN,

DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.

Appointed October 13, 1877.

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OBITUARY.

The Honorable JAMES CAMPBELL HOPKINS, late District Judge of the United States for the Western District of Wisconsin, departed this life at his residence in the city of Madison, Wisconsin, on the 3d day of September, A. D. 1877, during the June Term of the Circuit and District Courts of the United States for that district.

On the 4th day of September, 1877, a meeting of the Bar was held in the United States Court Room at Madison, and was called to order by H. S. Orton, Esq., on whose motion S. U. Pinney, Esq., was made chairman, and Rufus B. Smith, Esq., secretary.

On motion, a Committee was named by the chairman, consisting of H. S. Orton, Geo. B. Smith, Wm. F. Vilas, J. C. Gregory and H. M. Lewis, Esquires, to draft and report suitable resolutions, expressive of the sense of the Bar in respect to the death of Judge HOPKINS.

The Committee reported the following resolutions:

WHEREAS, It has pleased Almighty God, in His inscrutable providence, to remove by death, our distinguished fellow citizen and professional brother, the Hon. JAMES C. HOPKINS; therefore,

Resolved, That we especially condole with the bereaved and stricken family in their great affliction, and assure them of our deepest commiseration and sympathy, and while our weak words of well-intended consolation cannot assuage or mitigate their sorrow, we may be allowed to express the hope that he who has thus left them desolate, has passed into a happier existence, and that they will confidingly submit to this painful dispensation of Providence, and put their trust

in the "Father of the fatherless, and in the widow's God."

Resolved, That in the death of our lamented friend, the Bench has lost an able and an upright judge, our profession one of its most honored and distinguished lawyers, society one of its most useful and respected members, and the state one of its best and most prominent citizens.

Resolved, That the community has seldom been called to mourn the loss of one so perfect in all the elements and accomplishments of manhood, whose mental structure and acquirements were so symmetrical and available, whose social qualities and manners were so agreeable and attractive, and who was alike able and eminent as a lawyer and a judge. He was cut off in the midst of his arduous judicial labors and in the full maturity of his intellect and judgment, and when he had already achieved high honors and attained great success in the high position he occupied, with the promise and prospect of still greater usefulness and higher eminence in the future. Our memories of Judge HOPKINS will always be agreeable. In all social relations he was ever cheerful, courteous and kind, and it seemed to him a pleasure to render personal and professional favors. Upon the bench he was prompt, systematic, studious and attentive, patient and impartial, modest and forbearing, yet dignified and firm. He had great natural aptitude and vast and varied learning as a lawyer, uncommon mental strength and resources, readiness of apprehension and perception, clear and honest judgment, and remarkable powers of reasoning, analysis and discrimination in investigation of all subjects and questions brought to the Bar of the court or examined in judicial consultation.

Resolved, That in Judge HOPKINS and in his successful career in life, the young have an example worthy of imitation, in self-reliance, industry, patience, economy and success.

Rosolved, That a Committee be appointed to present these resolutions to the Circuit and District Courts of the United States, and to the Supreme Court and Circuit Court of the state, in this city, and request their entry of record.

The resolutions were seconded, and appropriate remarks having been made by several of the members of the Bar present, were then unanimously adopted. The chairman appointed H. S. Orton, Geo. B. Smith and I. C. Sloan, Esquires, a Committee to present the said proceedings to the courts named in the resolutions, to be there entered of record.

To the Hon. S. U. Pinney of Madison, Wisconsin, the reporter is indebted for the following sketch of the life of Judge HOPKINS.

JAMES CAMPBELL HOPKINS was born in the town of Pawlet, Vermont, April 27th, 1819, and was at the time of his death in the fifty-ninth year of his age. His ancestors both paternal and maternal were Scotch-Irish. When about five years of age, he with his parents removed to the town of Hebron, Washington county, New York, and not long afterward to the town of Granville, where he resided until he commenced his professional career. He was educated at the academy in North Granville, and in the spring of 1840 entered upon the study of law in the office of James McCall, Esq., at Sandy Hill, New York, and afterward continued it in the office of Messrs. Bishop & Agan, at Granville. He was admitted to the Bar at the January Term of the Supreme Court, in Albany, in 1845, and immediately after began the practice of his profession with Mr. Agan, at Granville, continuing with him about two years, and then forming a law partnership with Mr. Bishop, which continued until he removed to Madison, Wisconsin, in the spring of 1856. He was Post-master at Granville for a period of five years, and in 1853, he was elected to the Senate of New York, from the district then composed of the counties of Saratoga and Washington; he was an active, influential and efficient Senator, and a member of of the Judiciary Committee of that body.

Upon his settlement in Wisconsin, he became associated in practice with Hon. Harlow S. Orton, and at once entered upon a large and successful business. Soon after his arrival in Wisconsin a Code of Practice substantially like that of New York,

was adopted, and he performed the principal work in arranging it, and adapting it to the provisions of the Constitution and judicial system of the state. Politically he was an ardent Whig, so long as that party existed, and on the formation of the Republican party, allied himself and acted with that organization; but during his residence in Wisconsin, he gave but little attention to politics, his time being entirely occupied with the duties of his profession. He manifested but little or no ambition for the doubtful honors in modern political life.

He was an excellent lawyer, well read in his profession, and entirely devoted to its duties. With a clear discriminating mind, familiar with the practical affairs of business men, and the methods of business transactions, and with a judgment rarely at fault, he was a cautious, safe and reliable counselor. He was a close student, and prepared his cases for trial or argument with care, and was almost certain to be ready whenever they were reached, and for any emergency which might be reasonably anticipated. In the presentation of them, whether to the jury or the court, he was clear in statement, incisive, vigorous and able in argument, and keeping clearly in view the practical necessities of the case, he sought rather to instruct and convince, than to entertain or captivate his hearers, and whether at *nisi prius* or before the Appellate Court he was a wary, vigilant and formidable opponent. Quick to detect an error or mistake, he was certain to take advantage of and expose it. In his intercourse with his professional brethren he was obliging and courteous, and with an extensive fund of general knowledge he was a pleasing and instructive conversationalist. Added to these advantages, his habits of great industry, and promptness in the discharge of his duties, personal as well as professional, enabled him to acquire an extensive and lucrative practice, and a prominent position in the front rank of the Bar of the state.

By Act of Congress of June 29, 1870, Wisconsin was divided into two judicial districts, the Eastern and the Western, and on the 9th of July, 1870, Mr. Hopkins was

commissioned as District Judge for the newly created Western District. He at once entered upon the discharge of the duties of his position, and until his last illness he devoted with unremitting zeal and industry all his learning, his extensive experience and distinguished ability to the requirements of his judicial station.

A love of order and prompt and exact administration of the law, and his kindly courtesy and unwearied patience, rendered practice in the court in which he presided pleasant and attractive. Counsel never had occasion to complain that they had not been fully and fairly heard before him, or that even an implied restraint had been placed on an exhaustive discussion of all their points.

In the hearing and decision of equity causes, and in the administration of the system of bankruptcy then in force, with which he became thoroughly conversant and skilled in its prompt and efficient administration, he had few, if any, superiors. He delivered many valuable opinions which stand deservedly high as authority on questions of bankruptcy law. Long familiarity with and wide and varied experience in business transactions, enabled him to easily master the details of a cause, and readily perceive the precise point upon which it depended.

He was quick to detect any artifice, fraud or sham, and prompt and resolute to expose and rebuke it. The resolutions of the Bar give such full expression to his traits of character, personal, professional and judicial, that further statement seems superfluous. During the seven years of his judicial life, when not engaged in his own district, his time was almost constantly occupied in holding court in other districts of the circuit, and frequently at Chicago, where he was highly esteemed as an able judge, and wherever it was his fortune to preside, he won, as in his own district, the confidence and respect of the profession and all interested in the orderly, intelligent and impartial administration of justice. He was a genial gentleman, an excellent lawyer, and an able and faithful Judge.

RETIREMENT OF JUSTICE DAVIS.

RESOLUTIONS AND PROCEEDINGS.

The Retirement of Hon. David Davis from the Bench of the Supreme Court of the United States.

Hon. David Davis, justice of the United States Supreme Court, assigned to this Circuit, having resigned his position on the Bench of that court, for the purpose of filling the position of United States Senator, to which he had been elected by the legislature of the State of Illinois, the members of the Bar within this Circuit took early occasion to express their sentiments toward the retiring justice.

Action of the Chicago Bar.

The Chicago Bar Association, at their regular meeting passed the following resolutions:

The Honorable David Davis, one of the justices of the Supreme Court of the United States, after a service of more than a quarter of a century as Judge of the Circuit Courts of Illinois, and of the Federal Courts, having recently retired from judicial life, the Bar Association of Chicago think the occasion fitting and proper for an expression of the sentiments of esteem and personal good will, entertained by its members, in common with the Bar of the country, toward him.

During his judicial career no member of the legal profession or the community in which his courts were held ever questioned his integrity and honor. He has those clear perceptions and that keen sense of right which made his judgment of facts presented better than precedents, and enabled him to administer the law according to its spirit.

In his service of more than fourteen years upon the Supreme Bench at Washington and at the Federal Circuits, he was distinguished among his fellow judges for intellectual strength, sound judgment, and ability to analyze principles; and his opinions are models of directness, brevity and force.

In laying aside his judicial robes for another field of service to his country, Judge DAVIS carries with him the respect, the confidence and the affectionate regard of the legal profession of the country.

The following were the proceedings of the Southern Illinois Bar:

ACTION OF THE BAR OF SOUTHERN ILLINIOS.

Circuit Court of the United States, Southern District of Illinois, Thursday, July 12th, A. D. 1877.

Present, Hon. Thomas Drummond, Presiding Judge.

Samuel H. Treat, District Judge.

This day comes into open court Hon. J. T. Stuart, who addresses the court as follows:

May it Please Your Honors:

A meeting of the Bar of this district and state was held in this court room on yesterday, in which almost every section of the state was represented, and to be remembered for its numbers, and for the talent, learning and reputation of its members; a meeting called to take action in relation to the retirement from the Bench of Hon. David DAVIS.

It was hoped and expected that the able lawyer Hon. Stephen T. Logan, now venerable on account of his character and age, would perform the duty now devolved upon me of presenting to this honorable court and asking to be spread on its records these resolutions, passed by that meeting of the Bar:

Resolved, That the members of the Bar of the State of Illinois view with sensibility the retirement of the Hon. David DAVIS from the Bench of the Supreme Court of the United States, and express their profound regret that the

country is deprived of the benefit of his services in that distinguished place, which he has so long adorned by his learning, his industry, his urbanity, and his conscientious devotion to duty.

Resolved, That, in retiring from his eminent judicial station, he carries with him the confidence and high personal and professional respect and regard of the members of the Bar of the state of Illinois.

Resolved, That, a copy of these resolutions be forwarded by the chairman of this meeting to the Hon. David Davis, with an earnest expression of the hope that his future career may be as useful to his country and as honorable to himself, as his past, while judge in the courts of the State of Illinois, and of the United States.

The resolutions are expressive of the opinions of the Bar in regard to that distinguished citizen, and I can add but little to their force. David Davis was elected judge of the eighth Judicial Circuit of the state of Illinois in the year 1848, that being the first election for judges under the constitution of 1847, making the office elective. The eighth circuit was then composed of the counties of Sangamon, Tazewell, Woodford, McLean, DeWitt, Champaign, Piatt, Macon, Moultree, Shelby, Christian, Logan, Vermillion, and Edgar; a large circuit, and embracing a fair average of the intelligence of the people of the state, and of the talent of the legal profession. The election of Judge Davis, then a young man, in such a circuit was no inconsiderable compliment; but it was a higher compliment that for the ensuing six years he discharged the duties of that office so well, that in 1854, he was re-elected without opposition, and again re-elected in 1861 without opposition in a circuit somewhat changed.

Mr. Lincoln was no mean judge of human nature; he had practiced law at the same bar with David Davis from 1835 to 1848, and before him as judge for the twelve years prior to his election as President; and when he became President he appointed David Davis to the second vacancy on the Bench of the Supreme Court of the United States. Judge

DAVIS was a justice of the Supreme Court of the United States, and presiding justice of this judicial circuit from 1861 to 1876, a period long enough to test his capacity as a man and a lawyer. It would, perhaps, be out of place for me, before your Honors who have known him so long and well on the Bench and in the conference room, to say how well he discharged the duties of that high office, the most important and dignified in the Government; that from the time of his appointment to his retirement his capacity for judicial usefulness continued to grow and expand; that he administered the law and constitution faithfully, loved the truth and the right, followed fearlessly and boldly where his convictions pointed the way; that he was a just judge; that his retirement from the Bench has been followed by the regrets of the profession and the country; and that, especially in the language of these resolutions, he carries with him in that retirement "the confidence and high personal and professional respect and regard of the members of the Bar of the state of Illinois."

In presenting these resolutions and confining myself to the judicial life of Judge DAVIS, I, perhaps, have said all that I ought to say; but I cannot refrain from adding, on my own account, that I have known David DAVIS intimately and well as a man and as a lawyer, and in his social relations, for these forty-two years past; and that in all these relations he is without a stain, and that in all he has been true to himself, honest and honorable, and that from all his past life, he may be safely trusted to do, on all occasions, only what he believes to be true and right.

It is ordered, that the foregoing resolutions and the address of Hon John T. STUART thereupon, be spread upon the records of said court, and a certified copy thereof be transmitted to the Hon. David DAVIS.

ACTION OF THE INDIANAPOLIS BAR.

At the meeting called at the United States Court room in Indianapolis, to take action expressive of the feelings of the bar, in regard to the retirement of Judge David DAVIS from

the Supreme Bench, the following proceedings were had:

Judge Walter Q. GRESHAM presided, and the Hon. John D. HOWLAND acted as secretary. A committee on resolutions, consisting of the following gentlemen, was appointed: Hon. Joseph E. McDONALD, Gen. Benj. HARRISON, Judge S. H. BUSKIRK Hon. Thomas M. BROWNE, Hon. J. D. MORRIS, Judge Sol. CLAYPOOL, and Hon. W. P. FISHBACK. This committee retired and shortly reported the following resolutions:

The members of the Bar of the courts of the United States in this district, in view of the voluntary retirement of the Hon. David DAVIS from the Supreme Court, and the bench of this circuit, respectfully ask this court to accept and place upon its records this testimonial of respect and affection for the great judical officer who has withdrawn from this department of the public service. We have, for the last fifteen years, had personal knowledge of Judge DAVIS as one of the Associate Justices of the Supreme Court, and as the Justice assigned by that tribunal to hold the courts of the United States in the Seventh Judicial Circuit, and we have fully appreciated his learning and ability as a judge, and his fearless, independent, and impartial administration of justice. His knowledge of affairs, his intuitive discernment of character, his rapid analysis of evidence, however voluminous and complicated, his robust sagacity in detecting the vital facts in a cause, and his broad and masterly application of principles have stamped his judicial career as one of singular usefulness, and have furnished an example of judicial service which can never be forgotten by those whose privilege it has been to assist in it as members of his court. And it is not the judge alone whose loss we deplore. The man whose society we have enjoyed, and whose confidence many of us have shared, is dearer to us than the officer. His liberal humanity, his ready recognition of the rights and feelings of all with whom he is brought in contact, his indifference to merely accidental distinctions, his kindly interest in the young, his evident anxiety to search out and vindicate the very right of a cause, and his contempt for all arts, appliances and influences by

which the mind may be diverted from the direct channel of justice, have enriched and ennobled his career, and will make its memory precious to us forever.

Senator McDonald presented the resolutions. He referred to the time when Judge Davis came upon the bench as one particularly calculated to test the character of the man and the judge. Partisan strife ran high, and this had been intensified and embittered by civil war. But when Judge Davis assumed the bench the partisan was lost in the judge. From the beginning to the end of his judical career he was never known to swerve from the path of official duty.

General Harrison referred to the rare success of Judge Davis in winning and retaining the respect of lawyers, litigants and jurors. His attainments and personal character compelled the respect of all with whom he had intercourse as a judge or as a man. As a judge he was unsurpassed; his powers of analysis were especially marked in the manner in which he dissected intricate questions of evidence, and the clear and comprehensive way in which he presented such to juries. It is the expectation of his friends that he will pursue the same independence and unswerving integrity of character in the new position to which he has been called, as he ever manifested on the bench.

Hon. A. G. Porter said that Judge Davis was distinguished for the strong yet simple honesty of his character. He was intellectually and morally honest, and in his personal relations he was always honest and straightforward. He said some one had described him exactly when he remarked that "Judge Davis was big all over, intellectually, morally, and personally."

Hon. W. P. Fishback referred to the wonderful clearness and readiness of Judge Davis in grasping and analyzing legal questions. His was eminently a legal mind. He also referred to his rare social gifts, his kindness and simplicity of character. Hon. John Hanna, General Thomas Browne, Judge Buskirk, W. H. H. Miller, T. B. Buchanan and H. D.

PIERCE also made remarks, each paying tribute to the high qualities of Judge DAVIS as a judicial officer and a man.

The resolutions were then unanimously adopted and ordered spread upon the records of the Circuit Court, and a copy of the same sent to Judge DAVIS.

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SEVENTH JUDICIAL CIRCUIT.

THE BUCKEYE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1863.

IN ADMIRALTY.

1. FIRE—NEGLIGENCE.—Negligence cannot be inferred from the fact that a vessel is on fire. If the vessel were properly protected from fire, negligence must be proved.

2. DAMAGE TO CARGO—by water used in extinguishing fire does not constitute a case of general average.

This was a libel by William F. Tucker against the propeller Buckeye, owned by the Northern Transportation Company, and navigating the lakes, to recover damages for injury to part of the cargo in July, 1871. The libellant shipped on board the propeller for Chicago, a quantity of merchandise, and, while the propeller was at Detroit, embarking passengers, she was found to be on fire, in the hold, near the boiler. No one in charge of the propeller knew anything about the origin of the fire. An attempt to start the pony engine was unsuccessful, and the crew could make no impression on the fire

with buckets. The fire department of Detroit then took charge of the fire, and, with their steam engines, extinguished it; but, in so doing, entirely destroyed with water the libellants property in the hold of the propeller. Protest was entered by the captain at Detroit. The bill of lading contained the usual exceptions from fire risk.

Robert Rae and *F. L. Chase*, for libellant.

R. P. Spaulding and *H. F. Waite*, for respondent.

DAVIS, J.—The libellant relies on two points to recover: *First*, that the fire was the result of negligence on the part of the officers of the boat, *Second*, if this is not so, that he is entitled to contribution on the principles of general average.

In regard to the first point, no negligence has been shown and the burden of proof is upon the libellant.

There is no proof how the fire originated, and the evidence is clear that the boat was as well protected against fire as any vessel that ordinarily navigates the lakes. Unless negligence can be inferred from the fact that the boat was on fire, there is nothing in the case to condemn her on this account, and I think it would be going too far to apply such a rule as this.

The second question is one of general interest, and not without its embarrassments.

It is a principle founded in the highest equity, that when the ship and cargo are in imminent peril, and the whole venture is threatened with destruction, if any portion of the cargo or ship are sacrificed to save the common venture then the whole should contribute to pay the loss incurred for this purpose.

Is this such a case? The ship was not scuttled; no plank was broken, nor was the cargo sacrificed or intended to be sacrificed. And there is nothing to show that there was any intent to transfer the peril from the vessel to the particular goods. It may be said that the water could not be thrown

into the hatches without injuring the goods. This is so, but to bring the case within the doctrine of general average, there must have been a particular, voluntary purpose to destroy these goods, or to imperil them. It is true the water injured the goods, but it was not a foreseen or intended consequence, and in what was done the safety of the common venture was not thought of. The water was used to extinguish the flames without reference to the cargo, and although the captain hazarded the goods, he did not intend to destroy them, nor were they selected to suffer the peril in place of the whole, in order to save the remainder. This must be done in order to bring the case within the principle of general average as announced by the Supreme Court in *Barnard vs. Adams*, 10 Howard, 270.

The decree of the District Court is affirmed.

To constitute a case for general average, three things must occur: a danger in which ship, cargo and crew all participate; a voluntary jettison of some proportion for the purpose of avoiding the common peril; this attempt to avoid the common peril must be successful. *The Congress*, 1st vol. of this series, p. 42.—[*Reporter.*

LEVI Z. LEITER *et al.* vs. THE REPUBLIC FIRE INSURANCE COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY, 1873.

IN BANKRUPTCY.

1. BANKRUPTCY OF CORPORATION—AUTHORITY OF COUNSEL.—In order to authorize counsel to appear for a corporation and admit acts of bankruptcy charged, it is not essential that the corporators or shareholders should by vote authorize such action.

Certain creditors of the insurance company, on the 14th of November, 1872, filed a petition in bankruptcy against it, alleging various acts of bankruptcy, and asking that it be adjudicated a bankrupt.

The ordinary proceedings took place in the District Court, after the filing of the petition.

The company appeared, and filed a waiver of the return day of the rule to show cause, confessing the acts of bankruptcy set forth in the petition, and consenting to an immediate adjudication of bankruptcy. This paper was signed by counsel on behalf of the company.

An adjudication of bankruptcy was accordingly rendered, and the case went on in the usual manner until the 20th of May, 1873, when the petitioners in review in this court filed a petition in the District Court, asking that the decree in bankruptcy be set aside on the ground that the company was not insolvent as alleged in the petition, and had not committed the acts of bankruptcy therein declared, but particularly because the authority of the counsel confessing the acts of bankruptcy had not been sanctioned, previously to the confession being filed in court, by the stockholders of the company.

The District Court dismissed the petition, whereupon the case was taken by petition for review to the Circuit Court.

Eldridge & Tourtellote, for petitioners in review.

Tenneys, Flower & Abercrombie, for respondent.

DRUMMOND, J.—This seems to be the principal question raised in this court—whether when a petition in bankruptcy is filed against a corporation, it is necessary, in order to authorize counsel to appear and admit the acts of bankruptcy charged, that the corporators or shareholders should previously, by a vote, authorize the act, or direct it to be done.

The District Court dismissed the petition mainly on the ground that the property of the company had been placed in the hands of an assignee, who was proceeding to collect assessments and claims, and was ready to distribute the proceeds then in his hands among the creditors of the company; and that it was, therefore, not competent for the petitioners, who, it seems, were subscribers to the stock of the company, and who had been called upon to pay their subscriptions, thus to delay the application to the court for so long a time; but declaring that if the petition had been filed in apt time, it might have been the duty of the court to consider the allegations therein contained.

Petitioners here insist that the provisions of the 37th section of the bankrupt law, which declares that a petition may be filed by a corporation, when authorized by its corporators so to do, at any regular meeting called for the purpose, also apply to the case of an involuntary proceeding, against a corporation, by a creditor; in other words, that inasmuch as, before a petition can be filed by a corporation, there must be a vote of the corporators authorizing it; so, when a petition is filed against a corporation, by a creditor, there must also be a vote of the corporators to authorize counsel to appear and consent to an adjudication of bankruptcy, or to admit the acts of bankruptcy alleged.

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I do not think that is the true construction of section 37.

Congress, in authorizing the application of the provisions of the bankrupt law to corporations, thought it necessary (inasmuch as there might often be a question among the members of a corporation, whether, in a given case, it would be proper to apply for the benefits of the bankrupt law,) to declare that question should be settled in a particular way, namely, by a vote of a majority of the corporators, and, therefore, provided that application should be so made to the court.

This provision refers to the case of voluntary proceedings. But in case of involuntary proceedings against a corporation, it is to be inferred, unless there is some restriction in the law, that the usual course will be adopted, and matters proceed as in ordinary cases where legal measures are instituted against corporations; namely, that they will have the power to appear by counsel, be subject to the rules of pleading known and sanctioned by the courts, and that there will be the usual confidence existing between counsel and client in such cases; and that counsel will not do any act unauthorized by the corporation.

It might be said, with as much reason, that where a corporation is made an involuntary party, indirectly or collaterally, in a bankruptcy proceeding, counsel could not appear to represent it, unless expressly authorized by a vote of the corporators or shareholders; and that would hardly be contended.

It is conceded by petitioners here, that, if the proceedings had gone on in the usual way—if there had been a default and adjudication in bankruptcy rendered, or an appearance by counsel and a hearing or trial, and verdict and a decision of the court making an adjudication—a vote of the corporators would be immaterial, but it is denied that the rule applies to the case of appearance and of a cognovit made by counsel.

The necessity for resorting to a vote of the corporators

would not seem to exist, in as great degree, in one case, as in the other.

The corporation, in this case, was not a volunteer. It was compelled to come into court, and plead, in conformity with the rules of the court. As it could appear by counsel without a vote of the corporators, there was nothing to prevent counsel, when warranted in so doing by the regular agents of the corporation, from admitting the acts of bankruptcy stated in the petition, provided, upon a proper examination they were satisfied that the allegations were true, and that a trial, or hearing, would involve unnecessary expense and delay, and be of no advantage to the corporation itself or its creditors.

There is no question made as to the authority having been given counsel by the proper officers of the corporation, nor of the good faith of either, nor of their having acted upon the subject matter after proper inquiry. All these points must be assumed in favor of the acts of counsel and of the officers of the corporation.

The question is, then, simply as to the authority of the corporation to act through counsel in the manner pursued here, and the case would hardly seem to be one calling very stringently for the exercise of the power of interference of the District Court or of this Court.

An assignee has been appointed, and has administered upon corporate property, collected debts and distributed proceeds, and it would seem to be manifest that the reason for seeking this interference at this time arises, not from the fact that the petitioners in this court are corporators, and their rights as such are affected, but because of their being called upon to pay subscriptions to the stock for which they are liable, and as to which they are delinquent.

The order of the District Court, dismissing the petition, will, therefore, be affirmed.

UNITED STATES LIFE INSURANCE COMPANY vs. ALFRED B. ADAMS *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—JUNE, 1873.

1. BOND OF INSURANCE AGENT.—In Indiana it is not essential to the validity of the bond of the agent of an insurance company that he should have previously filed in the Circuit Court the papers required by the state statute.

2. LOCATION OF AGENCY.—The fact that the agency is not established in any particular county, does not avoid the obligation of the sureties.

This was an action of debt by the United States Life Insurance Company against Alfred B. Adams, the agent of the company, and his sureties. The declaration was on a bond in the penal sum of two thousand dollars, dated the 4th day of November, 1870, executed by the agent and other defendants, conditioned for the faithful performance by him of his duties as the agent of the insurance company, while transacting business in this state. The breach alleged in the declaration was that the agent did not pay over moneys to the principal which were collected by him in the course of his agency.

To this declaration there was a plea by the defendants that the insurance company was a foreign company, created under the laws of New York; that the agent was appointed for the southern half of Indiana, and that all the moneys received were received by him as agent for the southern half of the state; that no statement was made to the Auditor of state, or certificate given by him to the agent, as the law required; that there was no written instrument filed authorizing the acknowledgment of service of process by the agent, and that the statement and the certificate of the Auditor were not filed in the office of the Clerk of the Circuit Court of the county in which the agency was established.

To this plea there was a replication by the plaintiff that the statement and evidence were filed in the Auditor's office, setting out all the facts required by law, and the statement was in the replication; by which it appeared that it was filed in January and July, 1870; and it was alleged that the certificate of the Auditor was issued after these papers were filed, authorizing the agent to transact business in Indiana. It also stated that, as to not filing the papers in the Clerk's office at the Circuit Court of the county wherein the agency was established, that was an omission of the agent and not of the company, and that the requirement of the statute in that respect was merely directory, and not a condition precedent to the transaction of business.

To this replication defendants filed a demurrer.

Baker, Hord & Hendricks, for plaintiff.

McDonald & Butler, for defendants.

DRUMMOND, J.—The first question is as to the validity of the bond. Was the bond, at the time it was executed and delivered to the plaintiff, a valid bond under the laws of this state? It is to be observed that it was executed after the certificate was given to the agent by the Auditor, and although the agent had not filed the papers in the office of the Circuit Court of any county in the state, still there was nothing to prevent the execution and delivery of a bond covering the acts of the agent in the transaction of his business before that was done; so I know of no good reason why the bond, at the time it was delivered, was not a valid bond, at common law and under the laws of this state. The agent, by the certificate of the Auditor, was authorized to transact business for his company in the State of Indiana, and the omission to file the paper in the office of the Circuit Court was of an act which the statute imposed upon him, the agent. It will also be observed that while the act of 1865 declares that it shall not be lawful for any agent of a

foreign insurance company, directly or indirectly, to take risks or transact any business of insurance in the state, without first producing a certificate of authority from the Auditor of State, it imposes no such condition as to filing papers in the office of the Circuit Court, so that we have to interpolate into the act of 1865 language declaring that it is a condition precedent, or to assume that, as a necessary implication of the statute. All the decisions which have been referred to on the part of the defense, of the Supreme Court of this State, under this or similar statutes—*Barney vs. Daniels*, 22 Indiana, 207; *Daniels vs. Barney*, 32 Indiana, 19; *Hoffman vs. Banks*, 41 Indiana, 1—and in which the court held or intimated that a bond given would be invalid as against the sureties, were made where the bond was given before the acts were done which were declared to be conditions precedent by the statute. And in the case of the *United States Express Co. vs. Lucas*, 36 Indiana, 361, and in some other cases, the Supreme Court of this State concedes, that, although the agent may have collected money for a company, when the money was received in the performance of acts not warranted by law, yet, when received, the agent was bound to pay it over to his principal. So that as to the time and circumstances under which a bond was given, and which the Supreme Court of this State have held it invalid, it is different from this case, in that the law does not expressly declare that, until the filing of the papers in the Clerk's office of the Circuit Court, any act done shall be unlawful. If the bond was valid when executed, in this case, and we think it must be so considered, it only became unlawful by matter *ex post facto*, and we can see no objection to its affording protection to the company for unlawful acts of the agent. In *Daniels vs. Barney*, in 22 Indiana, a case already referred to, the Supreme Court says, that if it was executed to cover illegal as well as legal acts, the bond was void *ab initio*. That would be undoubtedly true, provided, at the time it was executed it was absolutely illegal; but, as we

have seen in this case, there was nothing to render the execution of the bond of the 4th of November, 1870, illegal. If every provision of the law were complied with prior to the transaction of business by the agent, and a bond were given, it could hardly be claimed that the bond would be inoperative as to the lawful operations of the agent simply because, in the course of his business, he might do something not authorized by the statute. The rule in such cases must necessarily be, that the bond would stand as to legal acts and fall as to those that were illegal. Now conceding that the agent did not, in this case, comply with the law in filing the papers in the office of the Clerk of the Circuit Court of the county; yet, when he collected money for his principal, it was not only lawful for him to pay it over, but he was bound to do so. Then the obligation of the surety is to make him perform, as to that, a legal obligation. The law implies a promise on the part of the agent to pay the money, and it is on that promise that the action is maintained against the agent, irrespective of the manner in which the money came into his possession, and it is for the doing of that which it is the agent's duty to do, and not for his illegal acts, that the surety is bound.

But, independant of all this, the plea alleges that the agent received the money in the course of his employment, and agency, in the business of the company in the southern half of Indiana, and does not aver that his agency was established in any county, or that the money was received there. The language of the statute is that the papers shall be filed by the agent in the Clerk's office of the Circuit Court of the county where the agency is established. What if no agency is established in any particular county in the state? What if he is an ambulatory agent, as this one seems to have been, authorized to transact the business throughout the southern half of the state, and there was not, in point of fact, any agency established in any one county; what becomes then, of the obligations of sureties on a bond which they have

executed? It may be conceded that the language used by some of the Judges in the cases decided by the Supreme Court of this State indicates a general rule—that while the agent is liable to his principal for money received by him in transacting business not authorized by law, the sureties on a bond are not so liable. But considering the plain equity of this case, and the clear intent of the parties when they subscribed this bond as sureties, I do not feel inclined to relieve them of their obligations unless there is some decision of the Supreme Court of the state upon the identical question which is now before this Court, and I think the cases which have been decided by that Court may be distinguished from the one now before this Court.

For the reasons given, therefore, the demurrer to the rep plication will be overruled.

I will say, in conclusion, that the only question made by the defendant's counsel is as to the point which I have been considering, viz: the consequences of not filing the papers in the Clerk's office of the Circuit Court. No objection is made to the statements contained in the replication, and it is not contended but that they have in all respects complied with the demands of the statute, both as to what the statement shall contain, and also as to the authority of the agent to acknowledge service of process; and it will be recollected that the question here is not between the state or its citizens, complaining that the agent has omitted to do what the statute requires, but between the agent himself and his principal, and between the principal and the sureties of the agent. And I confess that distinction is a nice one which insists that the agent is responsible to his principal for money had and received, and yet at the same time asserts that he cannot give a bond obliging him to pay it over, nor can another for him as surety.

GRESHAM, J., concurred.

THE MANISTEE.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JANUARY, 1874.

IN ADMIRALTY.

1. RUNNING IN A FOG—COLLISION.—When a steamer is running in a fog surrounded by sail vessels, and in close proximity to them, she ought to materially decrease her usual rate of speed: seven miles an hour is entirely too fast under such circumstances.

2. CONTRIBUTORY NEGLIGENCE.—In a collision where a fault is charged against one vessel, in relation to which the testimony is doubtful and it appears by undisputed testimony that the fault of another is flagrant, the latter only will be held responsible, and the doctrine of contributory negligence will not apply.

3. PAYMENT BY INSURER NOT INDISPENSABLE BEFORE FILING LIBEL.—Where a libel is brought by the underwriters for the loss of a vessel, they having paid the loss and claiming to be subrogated to the rights of the insured it is not material whether or no the money has actually been paid by them before the filing of the libel, if it was the *bona fide* intention of the owner to abandon.

H. H. & G. C. Markham, for libellants.

Finches, Lynde & Miller, for claimant.

DRUMMOND, J.—In this case I shall affirm the decree of the District Court.

The circumstances connected with the collision which gave rise to this case are briefly: that the propeller Manistee was coming across the lake on the morning of the 24th of May, 1872, bound for Milwaukee, and the schooner S. Robinson was bound down the lake. The morning was very foggy, with a light wind from the south and west. It was so

foggy that a vessel could be seen but a short distance. The Robinson had her port tacks aboard and was going free on her course, one point east of north. The vessels did not see each other until they were so near that a collision was very difficult to avoid; at any rate it could not be avoided I think, by the schooner. Whether or not it might have been prevented by the propeller after the Robinson was seen admits perhaps of more question.

The District Judge thought it could have been, but I do not think it is so clear. The propeller blew her whistle from time to time as she kept on her course. The evidence is quite satisfactory I think also that there was a horn blown on board the schooner. It is denied by those on board of the propeller that the proper blasts of the horn were heard, namely, three blasts of the horn, indicating what course the Robinson was on. There was a slight breeze, the schooner not going more than three or four miles an hour, three and a half, perhaps. What indicates how much the propeller is in fault is the fact that the fog was very thick; so thick that a vessel could be seen but a very short distance, perhaps not over one or two hundred feet. Although some of those on board of the propeller say it was not so, more of them say they saw the schooner a quarter of a mile. I doubt whether that is true. Of course, if it is true, the obligation on the part of the propeller to avoid the schooner was absolute. Now, admitting that they saw the schooner a quarter of a mile off, they necessarily admit that they were in fault by running afoul of her, and it would have the effect to relieve the schooner of all responsibility. But I think that they did not see the schooner a quarter of a mile off. The fog being so thick, and the inability to see vessels except when they came very close together, fog horns being heard from various vessels in the immediate vicinity, it was a flagrant fault for the steamer to keep on her course as she did without abating her speed and without checking it until the collision was probably unavoidable.

Now without laying down any absolute rule as to the speed at which a steamer should run in a fog on these lakes, there can be no question but that when a steamer is running in the fog, surrounded by sail vessels, as this steamer knew that she was, and in close proximity, that to run at the rate of speed that this propeller was running was a gross wrong, a great risk which she had no right to incur to the sailing vessels that were near.

I know what steamboat-men say; that they must make their time; that they must run in the fog. But they cannot be permitted to run with their usual speed in a fog, surrounded by sail vessels, against which they are liable to collide at any moment.

The District Judge thought the speed of this propeller was seven miles an hour. I think perhaps that the weight of evidence is that she was running faster than that. But, suppose it was only seven miles an hour; it was too great a speed under the circumstances. They knowing, as they ought to have known, that they were surrounded by vessels, they should have checked up so as to have had only reasonable steerage-way upon the propeller.

Then as to the fault of the schooner: I cannot see that there was any fault on the part of the schooner that contributed to this collision. The weight of the evidence is that she kept her course, as she had a right to do. After seeing the propeller it was impossible to avoid a collision—impossible at any rate on the part of the schooner. If there was a fault then, there was no fault on the part of the schooner that contributed to the collision. And where there is charged a fault against a vessel, as there is in this case by the defense, in relation to which the testimony leaves it doubtful whether it exists or not, and it appears by the undisputed testimony that the fault of the propeller is flagrant, a court will not find the other party in fault upon doubtful evidence when it can lay its hand upon a flagrant

wrong and say that that, at any rate, was mainly the cause of the injury sustained.

Now as to the blowing of the horns; the lookout; or the manner in which the schooner was steered—the testimony certainly is not satisfactory that there was a fault in any of those particulars, or any other, which contributed to the collision. Steamers must learn that they cannot rush through a fleet of sail vessels, on a public highway much frequented, in a dense fog, and in excuse say "We must make our time; they must keep out of our way." They must not say that and expect if they sink a vessel as this propeller sunk this vessel, to escape paying for the loss. It is as clear a case as I have ever had before me. The schooner that was sunk was loaded with 16,000 bushels of corn, and it was lost. She was stove almost right through amidships, and the men on board had hardly time or opportunity to escape, and in fact they lost a large part of their effects, clothing, &c.

The underwriters paid the loss on this corn, and they have come in and asked that they shall be repaid and subrogated for the owners in all their rights.

An objection is made to the libel. One of the underwriters paid for the loss which had been sustained a few days after the libel was filed, and it is claimed that the rights of the parties must have been consummated at the time the libel was filed. The only question is whether, if there was an abandonment on the part of the owner of the corn to the underwriter, it was in such a way as to indicate that he intended to clothe the underwriter with all his rights. It is not material, I think, whether or not the money had been actually paid. And the proof is abundant, in this case, that it was the intention of the owner of the corn to abandon all his rights and interests to the company, and it within a few days paid the loss, thus removing all doubt upon the subject as to the intention of the parties. I decide the case therefore upon the ground that, the owner having made an absolute abandonment, under circum-

stances showing that he did not intend to make any claim for the corn in any way, that it was absolute; that it was not necessary in order to file a libel that the money should be actually paid. Of course, there need not have been an abandonment in the strict sense of the term here, because the thing abandoned was in the bottom of the lake and never recovered. And that illustrates the view which the Court has taken; so that the libel, which is a libel by the underwriters, was properly sustained by the District Court, and the decree will be affirmed.

The cross libel filed by the owners of the propeller for the damages sustained by it because of the collision, was properly dismissed by the District Court, there being no cause for filing a libel against the Robinson or its owners.

The District Court seemed to think the schooner was seen a sufficient distance off to have avoided the collision if the proper precautions had been taken. I doubt that. I think the weight of the evidence is that the schooner loomed up all at once before the propeller so that neither could really have avoided the collision.

Decree for libellants.

EUGENE HOWLAND vs. LUCIUS BLAKE *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1874.

IN EQUITY.

1. EFFECT OF PAROL AGREEMENT UPON ABSOLUTE DEED.—A parol statement of a mortgagee when foreclosing that he "only commenced the suit for the purpose of perfecting the title; that the plaintiff's interests should not be affected by it; and that he would carry out a previous arrangement made that he would pay the debt out of the rents and profits," is not of such a nature as would make an absolute deed obtained by the mortgagee on foreclosure a conditional one, and would not render such a deed a continuation of the mortgage.

2. PAROL EVIDENCE TO CHANGE TERMS OF WRITTEN INSTRUMENT.—The rule which allows parol evidence to be introduced to show that a deed absolute on its face is a mortgage, should not be enlarged, but should be strictly construed, and the evidence should be very strong.

Dixon, Hooker & Palmer, for complainant.

Fish & Lee and *Fuller & Dyer*, for defendants.

DRUMMOND, J. The facts of this case may be briefly stated: Eugene Howland was the owner of a block in the city of Racine, which he mortgaged to Isaac Taylor to secure a loan made to him by Taylor.

The mortgagor, or rather his agent and brother, Richmond W. Howland, who seems to have acted for the plaintiff not only in the purchase of the property, but in the construction of the building which was put upon it and also in connection with the loan, came to the conclusion that the loan could not be paid except by the rents of the property, and Mr. Taylor was put in possession with a view of receiving the rents and profits, and so paying for the loan. This was done under a written contract or minute of possession.

Mr. Taylor accordingly took possession, leased the property, received the rents, paid the taxes and insurance, and took general charge of it.

The loan matured, and was not paid. The arrangement when Taylor took possession was, that when the money was paid, the property should be re-conveyed to the plaintiff. It not being paid at maturity, Taylor instituted proceedings to foreclose the mortgage. While they were pending in the state court, it is alleged that an arrangement was made between the brother of the plaintiff and Mr. Taylor, by which after the foreclosure Taylor was to hold the property as before and collect the rents, and when an amount was received sufficient to pay the debt, the property was to be re-conveyed to the plaintiff. The whole of that arrangement is stated by Richmond W. Howland, and it may be proper to refer to his testimony.

He states it as follows: "Shortly after the suit was commenced—that is the suit to foreclose—I called on him —(Taylor)—with reference to the foreclosure, at which time he assured me that the plaintiff's interest should not be affected by it; that he only commenced the suit for the purpose of perfecting the title. He also stated he would carry out in good faith all arrangements he had made previous to that. He agreed to bid in the property, pay the amount due on the judgment, and I was not to make any delay in the suit. He was to continue in possession, and apply the rents or earnings as he had done previously. After the debt was paid, the property was to revert back to the plaintiff. There was to be a conveyance made to him."

That seems to be the substance of the arrangement made, according to Richmond W. Howland. I do not know that there is anything in the evidence to change the account which is thus given by him.

Now, the question is whether, under the circumstances of the case, it is competent for the plaintiff thus to establish that the title which Taylor took under this sale was a mortgage,

and that he held it subject to the same equities on the part of the plaintiff, as he did prior to the commencement of any proceedings to foreclose the mortgage.

I think the weight of the evidence may be—although it is subject to a good deal of criticism inasmuch as a large part of it consists of admissions or statements made by Taylor, who is now dead—that perhaps some arrangement was made. But I am of opinion that it is not competent for the plaintiff to make out, under the circumstances in this case, that this second title was a mortgage precisely as it existed before the commencement of the foreclosure suit, and therefore I hold that all this testimony is incompetent. And it seems to me that this is a case where the Court ought to be somewhat stringent in relation to parol testimony.

The mortgagee, the purchaser under the proceedings in the foreclosure suit, is dead. He cannot speak for himself. Parties come forward who state what he agreed to do and what he said, and in that way it is sought to make out something different from what appears upon the face of the papers.

It is of course well settled that a deed absolute upon its face may be shown by parol to be simply a mortgage, a security for a debt. There may be some question as to the propriety of the adoption of that rule, but I suppose it may now be considered as settled that is the rule of equity upon the subject.

But where a mortgage is given and that mortgage is foreclosed, and the mortgagee is the purchaser and an absolute deed is made to him, the equity of redemption being foreclosed by judicial proceedings, I hold that the proof ought to be just as strong to make the second deed a mortgage as it would have been in the first instance, and perhaps even stronger.

Now, what are the facts under which it is sought to make out a new and independent contract by which this second title was to be held as a mortgage and not an absolute deed? What did Taylor do? What new fact occurred? Who was in possession of the property? Who remained in possession?

As to that, there was no change. The only thing that could be said to operate upon the parties in order to create a new arrangement, was that Richmond W. Howland was to do nothing to delay the proceedings. "I was to make no delay in the suit," he says. That is all there was. Now the question is whether that of itself constitutes such a new contract, or modifies or changes the old in such a way as to destroy the effect of the proceedings which actually took place.

It may well be asked, What was the object of Mr. Taylor in foreclosing this mortgage if things were to remain precisely *in statu quo?* He certainly had some motive in putting an end to the equity of redemption. And yet it is claimed that the equity of redemption still existed after the foreclosure, decree, sale and deed.

I have been referred to the case of *Paine vs. Wilcox*, in the 16th of Wisconsin, 202, which was not cited at the argument. That case was something like this. There was a mortgage of some land. The mortgage was foreclosed, a decree was entered, and the mortgagor made an arrangement with the mortgagee by which he agreed not to take an appeal from the decree of foreclosure, and placed the mortgagee in possession, and the mortgagee agreed upon the payment of the amount of the debt to re-convey the property. But that case proceeds upon this ground:—without criticising the case itself, which perhaps might well be done—that there was a new contract made so as to entitle the party to a specific performance of the contract; that there were circumstances in the case which took it out of the statute of frauds, and enabled the mortgagor to come into a court of equity and ask for a specific performance of the contract.

The Court held that the relinquishment of the further litigation, and omitting to stay the sale, were such acts of part performance as would take the agreement out of the statute of frauds, and that under such circumstances it was no obstacle to the enforcement of the agreement.

They also say that the party—the mortgagee—could not adopt the act of his attorney so far as to hold the title acquired at such sale, and repudiate as unauthorized the agreement by which the sale was allowed to take place, which seems rather a singular proposition; that a client is obliged to adopt an agreement made by an attorney simply because he is employed to foreclose a mortgage, and the force of which I do not very well understand.

Now, in this case, if the party is entitled to relief at all, it is because things were unchanged and the title was no more than it had been, that it was still a mortgage.

I do not feel inclined to hold in a case such as this, where a mortgagee forecloses his mortgage, and the equity of redemption is ended by the decree of a competent court, and he has taken an absolute title to the property, that he still is a mere mortgagee.

And it seems to me that the case in itself constitutes a very strong illustration of the propriety of not enlarging the rule which already exists, and which enables a party to show that a deed absolute upon its face is nothing but a mortgage.

The result would be that parties could go on without limit, and it might in effect be said that there never could be a foreclosure of the mortgage. Deeds might be made, foreclosures take place, and still it would be a mortgage. I am entirely willing to place the decision upon what is alleged to be the arrangement made between Mr. Taylor and Mr. Richmond W. Howland, and to say that it is not of such a character as to enable a party by parol to show that it was simply a mortgage or simply a security for a debt.

Now, I leave out of view the conduct of Mr. Taylor, which, of course, is entirely inconsistent with the theory claimed by the plaintiff, his treating the property as his own, making repairs upon it, paying the taxes and insurance, and selling it to these defendants, declaring that his title was a good title, making covenants of warranty, &c. I think it is quite possible that this may be the explanation of a good deal that

was said by Mr. Taylor, and so may be consistent with the truth of a portion of the testimony, namely, that he did not want this property himself, but the payment of his debt, and that he may have said in some loose way, from time to time, that was all he cared about. But, it is unlikely under the circumstances that a man should make an absolute contract, binding upon him for an indefinite time, to treat that which was a perfect title simply as a defeasible title.

The bill will therefore be dismissed.

NORTHERN TRANSPORTATION COMPANY OF OHIO vs. CITY OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1874.

1. FOREIGN CORPORATION.—A foreign corporation has the right to hold and occupy as lessee or otherwise, such property as is necessary or convenient for the transaction of its business.

2. EMINENT DOMAIN.—A municipal corporation has a right to enter upon a street, or tunnel under a street, for the purpose of making public improvements; and also has a right for the same purpose to enter upon, occupy and obstruct a portion of the river in front of plaintiff's lot, and construct a coffer-dam there if it was necessary in order to enable it to construct the tunnel.

3. NEGLIGENCE.—Under such circumstances, however, the city would be liable for damages if it did not use due skill, care and dispatch, so as not to unnecessarily interfere with private property.

4. TIME OF OCCUPATION.—The fact that the street and river were used for a great length of time makes no difference, as the injury, if any, is only greater in degree, provided however, that they were not used longer than was necessary.

5. DAMAGES FOR NEGLIGENCE.—The city would be liable for damages caused by the sinking of a wall by reason of the excavation, if they could be charged with negligence.

6. SINKING—CAUSED BY WEIGHT OF WALL.—But if such sinking was caused not by the weight of earth but by the superinduced pressure of the weight of the wall, there would be no liability.

H. F. Waite, for plaintiff.

T. Lyle Dickey, corporation counsel, for defendant.

BLODGETT, J.—Charged the jury as follows: This is an action brought by the plaintiff to recover damages by reason of having been deprived of the use of lot 1, in block 4, in the original town of Chicago, by the construction of La Salle Street tunnel.

It appears from the evidence in the case, and it may be taken as one of the admitted or conceded facts, that the plaintiff was in possession of the lot in question under a lease from Timothy Wright, which upon certain contingencies was to extend until 1877. The lot in question was bounded upon the east side by La Salle street, and abutted upon the Chicago river on the south, and was docked for the purpose of enabling vessels to approach along-side the end of the lot, and to there load and unload, and lie for the purpose of commerce; and the lot was also occupied or built upon by a warehouse, which was used by the plaintiff for the purpose of transacting its business.

It also appears that plaintiff is a corporation created under the laws of some other state than this—whether Ohio or New York is not material for the purposes of this case—and was engaged in the business of transporting freight and passengers by a line of propellers between the city of Chicago and the city of Ogdensburg, and transacting a general transportation business.

It is also conceded that La Salle street extends, as laid out, across the river, and is one of the streets of the city of Chicago. Whether it was so platted, and the plat so acknowledged as to vest the fee-simple of the ground covered by the street in the city for the purposes of a street, or whether, by the platting and dedication in the case, the city only acquired right to use the ground as a street, as a common public highway, under a common law dedication, is perhaps immaterial.

But the testimony on the part of the plaintiff tends to show that the street was so platted and recorded that the right of way only is vested in the city authorities, and that the fee-simple in the lands did not vest in the city authorities.

I do not consider, however, that this distinction is material for the purposes of this case.

It is also admitted that the defendant at the time mentioned, that is, in the month of November, 1869, entered upon La Salle street for the purpose of constructing a tunnel thereon under the river, and commenced the excavation necessary to construct the tunnel, as has been described to you by the witnesses, taking out the whole body of the earth or material in the centre of the street to within from 18 to 20 feet of the sides of the street, down to the depth of from 30 to 40 feet, removing the material and replacing in the excavation thus made the masonry for the construction of the tunnel; and that for the purpose of constructing the tunnel under the river, the city entered upon the river, in front of a portion of the plaintiff's lot, about 25 feet, and extended from the front a coffer-dam somewhat beyond the middle of the river, thereby depriving the plaintiff of access to its lot to the extent of the 25 feet, and to a considerable extent impeding the plaintiff's access to the remainder of its lot, so that it could not use its lot as conveniently as before the obstruction was placed there; not that the obstruction was total, but it was so great as to seriously impair the plaintiff's use of the property during the time the coffer-dam was retained in place.

It is also in proof on the part of the plaintiff that, by reason of the interference caused by the construction of the tunnel in La Salle street, and by reason of the coffer-dam in the river, the plaintiff was, for the time being, obliged to withdraw the transaction of most of its business from this lot, and obliged to rent other premises during the season of 1870, at which to transact its business, and also in the fall of 1869, to close up the business for part of the fall.

It is also proven on the part of the plaintiff, and insisted on the part of the defendant, that plaintiff had made arrangement with Mr. Diffendorf, by which Diffendorf took possession of the premises in question, paid the rental upon them, paid the plaintiff a certain amount of compensation for the expenditures which the plaintiff had put upon the premises by way of improvement, such as erecting buildings, etc., and paid the insurance and the taxes; that Mr. Diffendorf, as the plaintiff 's agent, transacted upon the premises the plaintiff's business on commission, and on being compelled to rent other premises, Mr. Diffendorf, at the end of the season of 1870, made a settlement with the plaintiff by which certain damages were allowed him for the inconvenience and expense to which he had been subjected.

The proof on the part of the defendant tends to show that the construction of this coffer-dam in the river was necessary for the purpose of constructing the tunnel in question, and that there was no practical method known to persons skilled in the business, by which the tunnel could have been constructed, except by the construction of the coffer-dam, so as to enable the excavation to be made in the bed of the river.

The evidence on the part of the defendant also tends to show that there was no unreasonable delay in pushing forward the work; that it was done as rapidly as it could be done, and there being no evidence on the part of the plaintiff to show that there was any unreasonable delay, it may be taken as a proven fact in the case that the construction of the coffer-dam was necessary to the progress of the work, and that the work was pushed forward with reasonable vigor and dispatch.

Taking these as conceded and established facts in the case, I shall deem it my duty to withdraw from your consideration a large proportion of the claim which the plaintiff has made against the defendant in this case; as I hold the law to be well settled, and so charge you as the law of this case, that the defendant had the right under the law to enter upon

La Salle street and make such public improvements as in the judgment of the city authorities were necessary, and to construct the tunnel in question, and that they also had the right for that purpose to enter upon the portion of the river in front of the plaintiff's lot, and construct the coffer-dam there, if it was necessary in order to enable it to construct the tunnel; that plaintiff took his lot subject to the right of the city to make the necessary public improvements in the streets. The method of crossing the river at this point was one to be determined by the city authorities; they could decide whether they would cross, or have the public cross, the river by a ferry, by a bridge, or by a tunnel, and when they had determined to effect the crossing by a tunnel, they had the right to use and occupy so much of the street as was necessary to construct the tunnel, using due skill, and care and dispatch, always in doing it, so as not unnecessarily to interfere with private property by such entry upon the street; although access to its property through the street may have been practically prevented by the occupation of the street, for the purposes of constructing the tunnel, and although access to the lot from the river may have been partially prevented during this time, yet these were incidental inconveniences to which the plaintiff, as owner of the lot, must submit in order that the public may be accommodated by the construction of the tunnel.

The city had the same right to enter upon the river for the purpose of erecting works there to facilitate the construction of the tunnel, that it had to enter upon the street and construct the tunnel itself, always, however, subject to the condition that it should not unnecessarily or negligently injure the plaintiff.

If, for instance, there was a want of due care in the management of the excavation, so that a portion of the plaintiff's walls were caused to crack or break down by reason of such negligence, the defendant is liable for such negligence, but not liable for the general act of entering

upon the premises; and therefore, if you find from the evidence in the case that by reason of the negligence on the part of the defendant, or its contractors, which is the same thing, in the bracing or staying of the banks of the tunnel or cut, the walls of the plaintiff's building were caused to fall down, or break, or crack, or become impaired, so that it was necessary to take them down, then the plaintiff would be entitled to recover such damages as the building sustained thereby, but the exclusion from the use of the building, or from the beneficial use, which has been complained of by reason of the necessary occupation of the street (because we must presume that it was necessary) while the tunnel was being constructed, and from the access to his lot by the river as conveniently as he otherwise would have had, but for the necessary construction of the coffer-dam, does not entitle him to the damages which he sustained by such exclusion.

I cannot distinguish the damage which the plaintiff sustained by reason of its exclusion from the lot in this case, from that which every lot owner sustains upon the streets of a city, by the tearing up of the street for the purposes of laying water pipes, or for the purpose of grading, or paving, or any other necessary work of repairing or improving the street; it is only greater in degree.

The plaintiff in this case may have been excluded from the enjoyment of his property eight months. The ordinary citizen by the laying of water pipes may have been excluded only for a week or a day from the convenient access to his premises, but it is the same kind of injury, and only greater in degree.

It is not a taking of the plaintiff's property for public uses. It is only subjecting him to inconveniences for the time being by the construction of public works, and as such, it is one of the incidents to owning a lot in a city, abutting upon a street and upon navigable water.

As I said before, this excludes from your consideration, therefore, the main element of damage which the plaintiff

has put in evidence here; that is, the expense of hiring other premises upon which to carry on its business during the season of 1870.

There is left, however, as I said before, the question to be considered by you in the light of the evidence, as to whether the work in La Salle street was so unskillfully or negligently done as to cause any part of the walls to fall, or the building to be impaired. You have heard all the testimony bearing upon that question.

The testimony tends to show, and does show, if I may so state, that the south-east corner of the warehouse, where the office and vaults were situated, became so impaired by the cracking or leaning of the wall outward that it was deemed necessary to take it down, and it was taken down and rebuilt, although there was no apparent settling of the ground in the immediate vicinity, nor any caving in, yet the wall seemed to fall from some cause at this point, and the claim is that it fell from the construction of the tunnel by some displacement of the ground, which was, perhaps, not apparent to the eye.

You will also bear in mind that the evidence shows that further along, near the north end of plaintiff's building, there was a caving in of the banks, so that the earth near, or, perhaps, immediately under the wall, was to some extent displaced. The wall fell down there, and was subsequently rebuilt, and the building repaired to some extent.

You have heard all the testimony in regard to the extent of the repairs, and the manner in which the building was left, and it is for you to say whether the building was substantially restored to its original condition by the repairs which were made, so that the plaintiff, on the removal of the coffer dam, and the other obstruction to the access of its property, could again enter into the enjoyment of its property as fully as before.

If you are satisfied that the building was not so repaired by the defendant as to make it as useful for the plaintiff's purposes as it was before the injuries occurred, then the

plaintiff will be entitled to recover such damages as would make it as useful for his purposes.

The plaintiff's title is by a lease, as has been stated, and while there is no express provision in the lease, or right on the part of the tenant to take away the building on the termination of the lease, there is no covenant on the part of the landlord to keep the building in repair; but I think a fair construction of the whole lease, together with the general law in relation to fixtures between landlord and tenant, taken in connection with the evidence in the case, shows that the building was a fixture, and was treated as such between the lessor and lessee.

It seems that the building was constructed several years prior to the making of the lease, which was in force at the time the injury occurred, and was constructed by the plaintiff under some former lease.

The lease continued until the plaintiff built these buildings, or rather the lease was extended or renewed. The plaintiff occupied the buildings with no covenant on the part of the landlord to keep them in repair.

The evidence shows that he had rebuilt them once, and I shall charge you that the buildings in question were a fixture which plaintiff had the right to consider as its own as between itself and any person committing an injury upon it.

It is for you to say, in the light of the testimony in the case, whether the building in question sustained any damage by reason of negligence or unskillfulness on the part of the defendant in the construction of the tunnel, and if it did, the plaintiff will be entitled to recover such damages as the proof in the case shows you these damages amounted to.

A point has been made that defendant, being a foreign corporation, is not entitled to hold property in this state. I simply charge you upon this question, it being purely a question of law, that the plaintiff had the right to occupy and hold, as lessee or otherwise, such property as was nec-

essary or convenient for the transaction of its business.

In considering the question of negligence, you should take into account all the circumstances of the case.

The evidence on the part of the defendant tends to show that it braced the cut as thoroughly as it thought the necessity of the case demanded, but the evidence shows that notwithstanding such bracing, it fell through in one place, or caved in, and the question arises whether, under the circumstances, the mere fact that it caved in does not show that there was some negligence somewhere. The fact that an accident occurred out of the ordinary course of events is usually evidence that somebody is to blame—that somewhere there has been negligence.

It was evidently the intention of these contractors, and of the engineers in charge of the work, that the embankment should be kept in an upright position, and it expected that it had resorted to means and instrumentalities sufficient to maintain it.

It is equally clear that some part of the embankment, notwithstanding these precautions, did fall in, and that thereby that part of the wall was broken.

The evidence in regard to the settling of the south-east corner, where the vault was located, is not so clear, but, at the same time, the concurrent settling away of the wall, with the progress of the work, is a circumstance to be taken into account by you in determining whether or not the excavation was the cause of the giving way of the wall at the south-east corner.

If you are satisfied that it was, then the question is, whether there was any unskillfulness or want of care in this regard, or whether it was one of those phenomena, or occurrences, which no precaution could have guarded against, whether any bracing across the cut at this point would have prevented the adjacent wall from being to some extent affected. You must pass upon these questions, gentlemen, in the light of evidence.

The Court cannot help you any more than to call your attention to the facts.

MR. WAITE: I will ask the Court to instruct the jury that even if the city be entitled to lay a coffer-dam along across the river, it had no right to lay the coffer-dam in front of the plaintiff's lot, and for any damages which the plaintiff may have suffered by the coffer-dam being in front of the dock, it is entitled to recover in this action.

THE COURT: I refuse this, always assuming that the proof shows that the coffer-dam was necessary. I look upon the river just as I do the street. They have the same right to go into the river and construct a coffer-dam, in order to complete the work, that they have to go on to the street and put down a track, or other work, which is necessary, in order to carry on improvements.

MR. DICKEY: I ask the Court to charge the jury, in so far as the settling of the walls of the building is concerned, that while it was the duty of the defendant to protect the work, so that the weight of the natural earth of the plaintiff's lot could not have caved in, yet it was not bound to protect against the effect of the weight of the wall of the building; that if the jury believe, from the evidence, that the cracking was caused by the weight of the wall, which otherwise would not have occurred, the defendant is not liable for this.

THE COURT: I will say to the jury, that if you are satisfied, from the evidence, that the sinking of the wall was due to the weight of the walls upon the selvage, or portion of the earth which was left, and not to the removal of the material which was taken out of the street, then the defendant would not be liable. If you are satisfied that if the wall hadn't stood upon the plaintiff's lot, at the place where it did, there would have been no change in the level of the ground there, but that the change in the level, which caused the deflection of the wall, was caused by the weight of the wall resting upon the the earth, after the excavation was made, then the defendant is not liable.

The principle is precisely like that of two adjacent owners, —one man building a building, and sinking his foundation four feet into the ground; the adjoining owner may think it is necessary for him to set his six or ten feet into the ground, and he excavates for that purpose. Now, if the wall first built, by reason of its own weight, causes the earth to crush or cave away, after the excavation, before the building has been erected upon the adjoining lot, the owner of the adjoining lot making the deeper excavation is not liable.

Each man, in other words, must look out for his own foundation.

The jury found a verdict for the plaintiff, and awarded one hundred dollars damages. Plaintiff appealed.

THE UNITED STATES vs. ASAPH H. HOWARD.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—MAY, 1875.

1. INDICTMENT FOR UNLAWFULLY WITHHOLDING PENSION UNDER § 5485 U. S. REVISED STATUTES.—In order to convict under this section it must be shown by the evidence:

1st. That the person from whom it is alleged that the whole or any part of a pension is wrongfully withheld is a pensioner of the United States.

2d. That the amount alleged to be wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner or claimant.

3d. That the person charged with the wrongful withholding was an agent or attorney of the pensioner, instrumental in prosecuting the pensioner's claim for pension, or if not an agent or attorney, was a person through whose instrumentality the claim was prosecuted.

4th. That the whole or part of the pension claim allowed and due such pensioner or claimant, was wrongfully withheld from the pensioner or claimant, by such agent or attorney, or other person instrumental in prosecuting the claim for pension.

2. AGENCY—WHAT CONSTITUTES.—The mere fact that a banker or other person agrees to collect a check paid to a pensioner by a pension agent, does not thereby make him an agent for the prosecution of the claim for the pension, but only an ordinary agent for the collection of the check, and if the pensioner accepts a certificate of deposit, in lieu of the check of a pension agent, the ordinary relation of debtor and creditor is created.

Levi Hubbell, for the United States.

W. B. Felker, for defendant.

DYER, J.—Charged the jury as follows: It is provided by statute of the United States that "any agent or attorney or any other person instrumental in prosecuting any claim for pension * * * * who shall wrongfully withhold from a pensioner or claimant, the whole or any part of the pension or claim allowed, and due, such pensioner or claimant shall be deemed guilty of a high misdemeanor."*

* Sec. 5485, U. S. Revised Statutes.

The indictment in this case is based upon this provision, and charges that on the 1st day of February, 1874, the defendant, Asaph H. Howard, was the agent of Mary F. Tucker, who was a pensioner of the United States, and entitled to receive from the United States a pension of $518.80; that the defendant undertook to be instrumental for said Mary F. Tucker in prosecuting her claim for said pension and collecting the same for her, and did prosecute her claim and collect and receive said pension for her; and thereupon wrongfully withheld said pension from her; and still so wrongfully withholds the same.

The gist of the offense made punishable by this statute, so far as I have brought the statute to your attention, lies in the wrongful withholding from a pensioner or claimant of the whole or any part of a pension or claim allowed and due such pensioner or claimant, by an agent or attorney, or any other person instrumental in prosecuting a claim for such pension.

To obtain a conviction under this statute, it must be shown

1st. That the person from whom it is alleged that the whole or any part of a pension is wrongfully withheld, is a pensioner of the United States.

2d. That the amount alleged to be wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner or claimant.

3d. That the person charged with the wrongful withholding was an agent or attorney of the pensioner, instrumental in prosecuting the pensioner's claim for pension, or if not an agent or attorney, was a person through whose instrumentality the claim was prosecuted.

4th. That the whole or part of the pension or claim allowed and due such pensioner or claimant, was wrongfully withheld from the pensioner or claimant, by such agent or attorney, or other person instrumental in prosecuting the claim for pension.

It is claimed on the part of the prosecution, that the defendant Howard was the agent of the pensioner Mary F.

Tucker, and as such agent undertook to be instrumental for the pensioner in prosecuting her claim for this pension and collecting the same; and did prosecute the claim and collected and received the pension and has wrongfully withheld it.

It is however claimed on the part of the defendant that Mrs. Tucker had received from the United States pension agent, a check for the amount due her, namely, $518.80 and placed the check in the hands of defendant, taking from him in lieu thereof a certificate of deposit for the amount, less $18.80, paid to her by him at the time, and that the certificate of deposit was accepted by Mrs. Tucker in place of the check and as representing the proceeds of the check deposited in defendant's bank. If you find from the evidence, that Mrs. Tucker exchanged the check on the Milwaukee bank which she had received from the pension agent, for a certificate of deposit, and took from the defendant such certificate, knowing it was a certificate of deposit, and accepting it as a substitute for the check, thereby intending as a depositor to rely upon the personal responsibility of the defendant or his bank, and so did not constitute him her agent for the prosecution of a claim for pension and for the collection of the same, there can be no conviction, because in that case the essential element of criminal intent would be wanting. If in the transaction Mrs. Tucker made herself the voluntary depositor of this check with defendant, and knowingly accepted an obligation to repay to her the amount of it, intending to trust to the credit of defendant or his bank and to look to him or the bank as the depository of her money, and not as an agent or person prosecuting her claim for pension and collecting it, then there was created the ordinary relation of debtor and creditor, and a criminal prosecution under this statute cannot be sustained.

The jury, after deliberation upon the case, requested further instructions, and were instructed as follows:

An agent is a person authorized by another person known

as a principal, to transact his principal's business, or to do one or more special things for his principal. To constitute an agency in this case on the part of the defendant, it must be made to appear from the evidence, that the defendant was authorized and empowered by Mary F. Tucker to prosecute her claim for pension; and in order to convict the defendant upon this indictment it must be shown beyond reasonable doubt, that the defendant, while acting as such agent in the prosecution of her claim, has wrongfully withheld from the pensioner the whole or part of this pension. If you find and believe, from all the evidence in this case, that Mrs. Mary F. Tucker, did ask the defendant to take from her and collect the money on the check which has been exhibited here in court, and if the defendant did take the check from her and agree to collect it for her, he thereby became her agent for the collection of the check. But the mere fact that he might thereby become her agent for the collection of the check, did not constitute him her agent for the prosecution of her claim for a pension. If, therefore, you find from the evidence that the defendant was merely the agent of Mary F. Tucker for the collection of the check which she had received from the United States pension agent, and was not her agent for the prosecution of her claim for a pension, there can be no conviction upon this indictment.

Verdict, not guilty.

JOHN P. KISSINGER vs. IRVING M. BEAN *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1875.

1. ASSESSMENT BY COMMISSIONER OF INTERNAL REVENUE—STOCKHOLDERS.—A member of a stock-company, a corporation engaged in the business of distilling spirits, is a person interested in the business within the meaning of the law, and is individually liable for assessments, and the court will not entertain a bill to restrain them.

2. Section 3224 U. S. Revised Statutes construed, and decisions thereon commented upon.

3. To justify a court in holding that Section 3224 is not controlling in any case, a very clear case must be made, showing that the assessment by the Commissioner could not by any possibility be legal.

This was a case brought in the State Court, the defendants being collector and deputy collector of internal revenue for the District, and removed to the U. S. Circuit Court, where a motion was made on the part of the Government to dissolve an injunction granted in the cause by the State Court. The facts remaining sufficiently appear in the opinion.

Winfield Smith, and *Matt. H. Carpenter*, for plaintiff.

G. W. Hazelton, U. S. District Attorney, for defendants.

DYER, J.—In this case the complaint and affidavits annexed, state in substance that the plaintiff is a merchant, doing business in Milwaukee, and is the owner of certain real and personal property; that in 1869, a charter was granted by the legislature of the State of Illinois, authorizing the organization of a corporation, which corporation was to carry on the business of distilling spirits in the county of Cook, in that State.

It is further alleged that in 1872 the entire stock of this

corporation, which was known as the Union Copper Distilling Company, was owned by Anton Junker, Joseph Rœlle and the plaintiff, each of these parties owning one-third of the stock.

It appears that the corporation thus organized and with this stock thus owned, proceeded to engage in the business of distilling spirits in the county of Cook. It had been, I should say, previously engaged in that business, and after the plaintiff became a stockholder the business was continued until July, 1875, when by seizure of the distillery and other property of the corporation the business terminated.

The complaint alleges, and the affidavit of Junker also states that the plaintiff, individually, has never been a distiller of spirits in the county of Cook or elsewhere.

It is further alleged that the commissioner of internal revenue assessed on the August special list, against the plaintiff and the two other parties associated with him, as stockholders in the company, a tax on spirits amounting to $236,738.39, which is a tax claimed by the defendants, who are the collector and deputy collector of this District, to be due from the plaintiff and Rœlle and Junker upon distilled spirits manufactured by them from September 1st, 1873, to May 10, 1875.

The pleading then sets forth proceedings taken by the collector for the collection of this assessment against the plaintiff, showing that all his property real and personal has been seized by the collector for the payment of that assessment, and is advertised for sale. The question here presented is, whether or not this action in equity to restrain the collection of this assessment, can be entertained, and whether the injunction granted by the State Court restraining the sale can be sustained in view of the prohibition of Section 3224 of the U. S. Revised Statutes, which is that "no suit for the purpose of restraining the assessment and collection of any tax shall be maintained in any court."

Is the plaintiff as a stockholder in this corporation individ-

ually liable to this assessment? Of course, if he is within the class of persons against whom such an assessment may be made, if, in other words, he is a person within the language, scope or spirit of the law, which defines what a distiller is, then the tax may be legally assessed, and there can be no intervention by the court in the form of proceedings to restrain that assessment or the collection of the tax.

Now this section 3224 clearly and absolutely takes away one of the remedies which a party would or might have, to contest the validity of an assessment made by the commissioner of internal revenue. It does not, however, take away other remedies or all remedies.

It simply deprives a party of the power to prosecute a suit for the purpose of enjoining the assessment and stopping the collection of the tax. Of course that provision may work in some cases, as it is claimed it does in this case, a great hardship; because a case may arise, where the tax, as is claimed here, is so large that the party may be unable to pay it and thereby secure the right to bring his action to recover back the money which he had thus paid. But in passing upon a question of this character, the court must be guided by general principles, and cannot be controlled by exceptional cases.

It may be stated as a general principle, that to give the commissioner jurisdiction to make such an assessment as was made here, the person assessed must be in the assessable class as defined in the statutes. For instance, if the commissioner were to assess a person as a distiller, who was beyond all question not a distiller, as, to illustrate, if the person assessed as a distiller were a lawyer, and in no manner interested in the business of distilling, this action of the commissioner would be *ultra vires*. It would be entirely unauthorized by the statute, and would be transcending the power which the statute confers upon him, because he can only assess such persons as are by law made liable to the payment of the tax. Referring to the case of *LeRoy vs. The East Saginaw Railway*, 18 Michigan, 234, cited on the argument, it seems that there

was a statute in that state which provided that railroad companies should pay a certain percentage on the whole amount of their capital to the state treasurer on a certain day in each year. This was to stand in lieu of all other taxes, and no town, county or state assessor had any right or authority to assess a tax against any railroad corporation.

There was also a statute which provided that "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any law of this state;" a provision which stands in analogy to the statute which we have to consider here, forbidding any suit for the purpose of restraining any assessment or any tax assessed by the commissioner of internal revenue. In the case referred to, a tax was assessed against the railway company, and upon warrant for its collection, the tax collector seized property of the company. The company replevied the property, and the question was, whether in the face of the statute forbidding replevin, that action could be maintained in that case. Judge Christiancy says, in his opinion that "this provision, prohibiting an action of replevin, must be construed as applying only to cases in which a valid tax might by legal possibility have been imposed and collected by regular and proper proceedings under some statute authority." In this latter class of cases, he says, "this provision would prohibit the action of replevin though the statute authority might not have been fully complied with, and the proceedings might have been so far irregular as to defeat a sale of real estate sold for such taxes." Following the doctrine laid down in that opinion, it should be entirely obvious that it is not within legal possibility that the commissioner could assess a valid tax against the plaintiff in order to justify the interposition of this court by injunction. It should be clear that the proceeding on the part of the commissioner of internal revenue is an absolute nullity, in order to sanction the interference of a court of equity. If the plaintiff is within a class of persons against whom the commissioner may make assessments, though his

proceedings be ever so irregular and erroneous, the court cannot interfere.

In the case of *Delaware R. R. Co. vs. Prettyman, collector, etc.*, 17 Internal Revenue Record, 95, the court held that an "assessor of internal revenue acts judicially in determining what persons and things are subject to taxation under an act of Congress levying taxes. If the subject matter is within his jurisdiction, that is, if he is bound to inquire, and determine who, and what are subject to taxation, a mistake as to the person or thing taxed, or an irregularity of proceeding on his part, will not invalidate his action as assessor so far as to make the collector who proceeds on a warrant in proper form to collect the tax, a trespasser."

"The purpose of the act of Congress was to prevent any interference with the prompt and regular collection of the revenue, and the interposition of any defense to a national tax, levied by an assessor acting within his jurisdiction, would be equally fatal to the purpose of Congress, whether said defense is founded on the alleged unconstitutionality of the act, its invalidity or want of application to the case."

The court in that case further hold, that "it is within the range of possibility, however, that the tax may be such a clear and manifest violation of the law, something which is so clearly prohibited to be taxed, or distinctly excluded from the subject-matter of taxation, as that the assessor cannot be said to have any discretion or judgment in regard to assessing such a tax, and he cannot be said to have jurisdiction of the matter. In such case it has been agreed that the proceeding is a mere nullity, and will not afford a basis for any legitimate action."

Again, as to the power of the officer, the court say, "it is his duty to inquire who and what are subject to taxation; that is, it is within his jurisdiction to determine this. A mistake as to the person or thing to be taxed, though remediable by various other means, cannot be reached by proceedings against the ministerial officers such as the collectors who execute the warrant."

That proposition states the case rather more strongly than I would be prepared to state it, because in its strict letter it might lead to this conclusion: that where the commissioner had determined that a person clearly not within the assessable class was nevertheless subject to assessment, his determination was of a judicial character and not to be questioned by the courts in any proceeding in equity. That proposition in the strong terms in which it is pronounced is perhaps not quite reconcilable with the other expression in the opinion, namely, that it is within the range of possibility that the tax may be such a clear and manifest violation of the law that the whole proceeding would be a nullity. In other words, I should not be prepared to hold that if the commissioner were to determine that a person not a distiller and not interested in the business of distilling was subject to assessment as a distiller, that he was then within his jurisdiction, and that a court of equity could not, because of the prohibition in Section 3224, intervene. In the case of *Pullen vs. Kinsinger and others*, 11 Internal Revenue Record, 197, Judge Emmons asserts, I think, the correct doctrine on this subject. He says: "If an officer has the power to assess generally, and the duty of determining what is within this power is imposed upon him, if the thing assessed is in its nature in any circumstances capable of being brought within the law, an erroneous decision in this regard does not render the proceeding void." Now, in the case under consideration, we have seen that the plaintiff was assessed by the commissioner with other parties as stockholders in this alleged corporation. True, he did not bestow his personal attention upon that business; he did not give to it his personal supervision, but his interest in the business as a member of this company was actual. He was represented in the business by the investment he had made in it, and this investment and interest enabled him to participate in the dividends and profits realized.

Is it, therefore, beyond legal possibility that the commis-

sioner could assess a tax against these members of this corporation as individuals, the plaintiff included? Is it clear beyond doubt, that the proceeding on the part of the commissioner here complained of is an absolute nullity, as it would be if he were to make an assessment against a person who confessedly was not a distiller, and was not interested in the business of distilling? Is the person assessed here, in the language of Judge Emmons, in any circumstances of the case capable of being brought within the law? If by possibility, he can be brought within the terms of the law, though the commissioner may have made an erroneous decision in that regard, the proceeding is not void. It is not a nullity so as to authorize this court to arrest the collection of this assessment by injunction.

Now let us examine for a moment Section 3259 of the statutes. Its language is, "every person engaged in, or intending to be engaged in, the business of a distiller or rectifier, shall give notice in writing, subscribed by him, to the collector of the district wherein such business is to be carried on, stating his name and residence, and if a company or firm, the name and residence of each member thereof, and the name and residence of every person interested or to be interested in the business, etc." This notice is a pre-requisite to lawfully engaging in the business, and there seem to be three classes provided for in this section; first, any person engaged in or intending to be engaged in the business, must give his name and residence in the notice. Second, if a company or firm, the name and residence of each member of the firm must be given; and then another class, namely, every person interested or to be interested in the business must give name and residence.

Now the question is, whether a member of a stock company, a stockholder in a corporation engaged in the business of distilling spirits, is not a person interested in the business within the meaning of the law. It was conceded upon the argument that there is no provision of the statute expressly

covering corporations organized for the purpose of and actually engaging in this business; and I am satisfied upon examination of all the statutes bearing upon this subject, that in assessing and collecting taxes upon distilled spirits the government must deal with the individuals interested in the business, although such individuals are carrying on such business by means of associated capital and in the form of a corporation; and there may be a wise purpose in this legislation by Congress. For instance, a corporation may be possessed of very little property; or its property employed in the business may be of inconsiderable value and utterly inadequate to satisfy a tax justly due to the government on account of the spirits produced, and though the stockholders of that corporation may have accumulated property from the profits and dividends of the business, greatly in excess of any tax that might be assessed, nevertheless, if there is no liability on the part of the individual members of the corporation, the power of the government to enforce the payment of the tax would be limited to the property of the corporation however inadequate. That property might be, as I have said, utterly insufficient, while the stockholders in the company might be abundantly able to respond to any tax that might be assessed by the government; yet, upon the construction of the law contended for, these stockholders would reap the profits and escape the burdens of the business. Upon the best reflection I have been able to give to the question, I am not prepared to give that construction to the law.

The business in which the plaintiff and his associates were interested was that of distilling spirits. It is true that that business was conducted and carried on in the name of and by this stock company of which the plaintiff was a member. Admit that the plaintiff did not actively participate in the transaction of that business, yet, as I have said, he was represented in the business by the investment he had made as a stockholder in the enterprise.

To relieve the plaintiff by means of the proceeding which

has been instituted here, and to entitle him to the equitable interposition of the court, it must be shown that he is so clearly outside of the jurisdiction that may be exercised by the commissioner in making assessments against persons interested in distilling spirits, that by no legal possibility could the tax be assessed against him. It must be clear beyond doubt that the plaintiff was not within the class of persons liable to assessment under the statute, to enable him to invoke the restraining power of the court.

I am not prepared to say that the commissioner was outside of the limits of his jurisdiction in making the assessment in question.

I do not think that such a clear case is made as to justify the court in holding that Section 3224 is not controlling upon the question of remedy here resorted to.

The injunction granted by the State Court must be dissolved.

ESSELTYNE *et al.* vs. ELMORE *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1875.

IN ADMIRALTY.

1. DEMURRAGE—REASONABLE TIME.—In this case five days were considered a reasonable time in which to unload a vessel laden with 567 tons of coal, demurrage being allowed for the detention of the vessel after that time.

2. The charterer of a vessel takes all risks as to delay from any unforseen circumstances.

H. H. & G. C. Markham, for libellants.

Finches, Lynde & Miller, for respondents.

DRUMMOND, J.—The libellants, in the fall of 1872, were the owners of the schooner Montana, and the defendants were coal merchants in Milwaukee. The libel is filed by the owners of the Montana, for the detention of the schooner by the defendants, in November, 1872. The schooner, laden with five hundred and sixty-seven tons of coal consigned to the defendants, arrived in Milwaukee from Erie, Penn., on Sunday, the 17th of November. The captain reported his arrival the next morning at the office of the defendants. The defendants were not then in their office, but an intimation was given by a clerk in their employ that the Montana was to go to the upper dock of the defendants—they having at that time three docks for the landing of coal and other merchandise. It was also then stated by the clerk to the captain that there was a vessel already unloading at the upper dock, and that another vessel was expected to proceed there in a short time, it already being in port, having arrived before the Montana.

The captain called again at the office of the defendants in the afternoon of the 18th of November, and was told by one of the defendants to take his vessel to the upper dock. He accordingly went there, and found two vessels which were to be unloaded before the Montana. In consequence of this, and of the prevalence at the time of a horse disease called the epizootic (horses being much used in unloading coal from vessels), they did not begin to unload the Montana until Friday, the 22d, and the unloading was not completed until late Tuesday night of the 26th of November.

The vessel being consigned to the defendants, and they being the owners of the coal, under the conceded facts of the case, it became their duty to furnish, within a reasonable time after the arrival of the Montana was reported to them, a suitable place for the unloading of the vessel, and to complete it, also, within a reasonable time. The evidence shows—it being near the close of navigation—that a considerable number of vessels had arrived with cargoes consigned to the defendants about the same time. But it is manifest that the Montana could not be responsible for that circumstance. It was a separate and independent contract made between the schooner and the defendants for the transportation of coal from Erie to Milwaukee, and the duties of the defendant in unloading the Montana did not depend upon the fact that other vessels arrived at about the same time. That was a risk which the defendants themselves took when they agreed to freight the schooner from Erie to Milwaukee.

The weight of evidence is that the captain of the Montana was induced to believe by the conduct and declarations of the defendants, that the schooner Hattie Johnson, one of the vessels found at the upper dock, was to be discharged there before the Montana, and he must, therefore, for this reason, as well as for others appearing in the testimony, be excused for not reaching the dock before the Hattie Johnson. Now it must be apparent on this statement of the evidence, that it was not the fault of the Montana that she did not go to the

upper dock on the morning of the 18th, because the captain did not then receive any direct instructions to go there, and there were no instructions left by the defendants in the office, he having called there several times, and when he first saw the defendants in the afternoon he was directed to go to the upper dock, and he says (there is no controversy about that) that he immediately proceeded there, and when he arrived he found two vessels, the Dore in the act of being unloaded, and the Hattie Johnson lying outside ready to take her place.

According to the rules of the port, and as of right, perhaps, they were entitled to be discharged before the Montana, there being no means to unload two vessels at the same time. It was immaterial to the defendants which of the schooners was discharged first, the Hattie Johnson or the Montana. There had to be a delay of the one or of the other.

It does not clearly appear that the principal delay in unloading arose from the prevalence of the horse disease at the time, but rather from the fact that adequate dockage was not seasonably furnished by the defendants. As I have said, the Montana was not responsible for the arrival of vessels consigned to the defendants about the same time; that was a risk which the defendants themselves took. It was, I think, the duty of the defendants to furnish dockage to the Montana by Tuesday, the 19th of November, and even under the adverse circumstances of the time, the unloading should have been finished by Friday. In taking this view of the case I am not unmindful of the difficulty of unloading vessels at that time, in consequence of the prevalence of the horse disease, a circumstance which strictly speaking ought not, perhaps, to be considered at all, because it might well be questioned whether that was not one of the risks that the defendants took. In allowing until Friday to unload the vessel, I give all the time that was really taken by the defendants. They commenced the unloading of the Montana on Friday, and they finished it Tuesday, that would be four working days. So that I have taken, I think, a favorable view of the

rights of the defendants in stating that they were entitled until Friday to complete the unloading of the vessel. Then, all the time after that was taken unnecessarily. It was a detention for which the defendants are responsible to the owners of the vessel. That would constitute a delay of four days.

The unloading ought to have been completed Friday night at the very latest. It is a matter of some difficulty to determine the extent of the defendant's responsibility. It is to be borne in mind, however, that it was at a season of the year when the Montana was peculiarly entitled to dispatch; towards the latter part of November, when navigation was about to close, and when it was desirable that the schooner should have an opportunity to take freight for another port. But my experience is that all vessel-owners, in stating the value of the use of their vessels, are very apt to exaggerate. I have always felt inclined to make considerable deduction from the accounts which they give of that value.

So that, in view of this, the only allowance I shall make to the libellants for the delay, is four hundred dollars, one hundred dollars a day. I therefore shall allow a decree to pass against the defendants for that amount, together with interest from the first day of December, 1872.

The result of this is that the decree of the District Court dismissing the libel, must be reversed, and a decree for the above amount rendered, together with the costs in the court below, and in this court.

See case of *Blake vs. Fulton*, Vol. 5 of this Series, p. 371.—[*Reporter.*

CHARLES HOWARD vs. THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1875.

1. LIEN OF JUDGMENT—PRIORITY.—A judgment prior in point of time is paramount to a posterior judgment, even though the latter be first enforced, and the former is enforced by a bill in equity to which the owner of the second judgment is not made a party.

2. *It seems*, however, that in such case a court of equity would allow the junior judgment creditor to redeem even after the statutory period for redemption had expired.

The plaintiff sought to recover from the defendant the possession of a strip of land about eighty feet in width, occupied by defendant as a road-bed and right of way for its railroad, and extending from the south end of block 41, in the second ward of the city of Milwaukee, to a point where the same crosses the west line of the town of Granville, in Milwaukee county.

On the 1st of May, 1858, Sebre Howard obtained a judgment against the La Crosse & Milwaukee Railroad Company, in the Circuit Court of Milwaukee County, for $25,586.78. On the 29th of October, 1858, execution was issued upon this judgment, and on the 15th of January, 1859, the sheriff of Milwaukee county sold the property before mentioned, upon the execution, as the property of the judgment debtor, to the plaintiff for $4,000, and by deed dated 13th June, 1862, conveyed the property to the purchaser. Before the issuing of this execution the judgment had been assigned to the plaintiff, and the sheriff's deed was recorded November 20th, 1863.

It was under this proceeding that the plaintiff claimed title.

There were liens upon the property by mortgage and judgment prior in date to plaintiff's judgment, among which were a mortgage executed 17th of August, 1857, by the La Crosse & Milwaukee Company to Bronson and Soutter, to secure the payment of $1,000,000, and a judgment in favor of Newcomb Cleveland rendered October 7, 1857, by the United States District Court for the District of Wisconsin, for $111,727.71 damages and $544,15 costs, which judgment was docketed on that day.

On the 21st day of June, 1858, the La Crosse & Milwaukee Railroad Company executed a mortgage upon its railroad and property, to secure the payment of $2,000,000 of bonds, and on the 11th of August, 1858, made to the same party a supplemental mortgage further securing the payment of the same bonds. The first installment of interest upon that mortgage fell due January 1, 1859. The mortgage was subsequently foreclosed by advertisement, and on the 21st of May, 1859, all the property, franchises and rights of the mortgagor were sold under the mortgage, and bid off by Barnes in trust for the bondholders. On the 23d of May, 1859, Barnes and the bondholders in interest united as purchasers of the property in organizing a corporation under the statutes of Wisconsin, which received the name of the Milwaukee & Minnesota Railroad Company, and the rights and interests, whatever they were, acquired by Barnes and the bondholders, were transferred to the Milwaukee & Minnesota Railroad Company.

On the 9th of December, 1859, Bronson and Soutter filed a bill in the District Court of the United States for the District of Wisconsin, to foreclose the $1,000,000 mortgage, which covered the line of road from Milwaukee to Portage City. The La Crosse & Milwaukee Railroad Company, the Milwaukee & Minnesota Railroad Company, Sebre Howard, Charles Howard the plaintiff here, and others, were made defendants in that action. Sebre Howard answered the bill, setting up his judgment and contesting the mortgage. It is

unnecessary here to trace the steps of that litigation further than to say that it culminated in a decree of sale, with an order that in case the Milwaukee & Minnesota Company should, before sale, pay into court certain sums amounting in all to about $468,000, it should be let into possession of the road, rolling stock and other property of the La Crosse Company, from Milwaukee to Portage, subject to prior liens. On the 4th of January, 1866, pursuant to that order, the Milwaukee and Minnesota Company paid that sum into court, and on the 9th of January, 1866, took possession of the property, and managed and operated it from that time until the 6th of March, 1867.

In April, 1863, Frederick P. James and others, judgment creditors of the La Crosse & Milwaukee Railroad Company, filed in this court a bill against the Milwaukee & Minnesota Railroad Company, the La Crosse Company and Selah Chamberlin, which prayed among other things that the sale under the Barnes mortgage might be decreed fraudulent and void, and the Milwaukee & Minnesota Company be decreed to take nothing under that sale, and that that Company be enjoined from taking possession of or exercising any control over the property and franchises mentioned in that mortgage, or from interfering in any manner with the road or its franchises, or the management thereof. That bill was dismissed by this court July 17, 1865, but on appeal to the Supreme Court of the United States the decree of dismissal was reversed, and in obedience to the mandate of the Supreme Court, on the 9th of July, 1868, a final decree was rendered in that cause, by which it was decreed that the foreclosure and sale of the Barnes mortgage be set aside and annulled as fraudulent, and the Milwaukee & Minnesota Company was perpetually enjoined from setting up any right or title under it to the railroad and other property sold under that mortgage, and the Barnes mortgage was decreed to remain only as security for the bonds issued under it in the hands of *bona fide* holders for value without notice. The decree also contained an order

of sale of the railroad and property, but no sale was ever made under that decree.

On the 18th of April, 1866, Frederick P. James, assignee of the Cleveland judgment, filed his bill in this court against the Milwaukee & Minnesota Railroad Company, to enforce the lien of that judgment, and to have the property covered by the lien sold. The bill in that case set out the judgment, also the mortgage to Barnes, and the creation of the Milwaukee & Minnesota Company, alleging that mortgage to have been fraudulent, and that the Milwaukee & Minnesota Company were holding the property in fraud of the rights of creditors of the La Crosse & Milwaukee Company, and prayed a sale of the property for the satisfaction of the Cleveland judgment, subject to certain prior liens and incumbrances. On the 11th of January, 1867, a decree was entered in said cause by which it was adjudged and decreed that there was due to James upon the Cleveland judgment $98,801.51, and that the same was a lien and incumbrance as of date of October 7, 1857, upon all the right, title and interest which the La Crosse & Milwaukee Railroad Company had in and to the property situated between Milwaukee and Portage City. The decree provided for a sale of all the railroad formerly known as the La Crosse & Milwaukee Railroad, from Milwaukee to Portage, then in the possession of the Milwaukee & Minnesota Company, and that that Company and all persons claiming under it be barred from all equity of redemption. This decree also contained the recital that the La Crosse & Milwaukee Company had ceased to exist as a corporation, and that the Milwaukee & Minnesota Company had succeeded to its property subject to liens and incumbrances thereon. On the 2d of March, 1867, pursuant to this decree, a sale was made by the Marshal to the defendant, for $100,920.94. On the 5th of March 1867, the sale was confirmed by the court and a Marshal's deed executed. On the 6th of March of the same year, on demand, the Milwaukee & Minnesota Company surrendered possession to the

defendant as purchaser of the property, and the defendant has since claimed to be the owner of the property and has been in possession.

Finches, Lynde & Miller, for plaintiff.

John W. Cary, for defendant.

DYER, J.—The mortgage from the Milwaukee & La Crosse Company to Barnes was posterior to the plaintiff's judgment. The sale by advertisement under that mortgage left the plaintiff's judgment and the sale thereunder unaffected as to priority and as to rights accruing from priority. Indeed I do not see that the record of the Barnes mortgage and foreclosure is at all material here as an aid to the defendant's alleged title, except to show the origin of the the corporation known as the Milwaukee & Minnesota Company.

Although a bill was filed to foreclose the Bronson and Soutter mortgage, there was no sale upon that mortgage. The result of that proceeding, if I correctly understand the record, was to vest in the Milwaukee & Minnesota Company the possession of the railroad and property. By payment of the $468,000 as permitted by the court, it acquired the right of possession and the possession in fact of the mortgaged property. To this extent at least it stepped into the place of the mortgagor and owner of the equity of redemption. But this possession and interest of the Milwaukee & Minnesota Company were all the time subordinate to prior liens and interests, among which were the plaintiff's judgment and sale.

This proceeding under the Bronson and Soutter mortgage, did not therefore affect the plaintiff's interest, as it would have done had. there been a sale thereunder, and its materiality, so far as the defendant's claim of title is concerned, is not apparent except as showing the relation of the Milwaukee & Minnesota Company to the property in question.

The judgment which is the basis of the plaintiff's claim of title was docketed May 1, 1858. The judgment upon which the defendant rests its assertion of title, was docketed October 7, 1857. The Howard judgment under which the plaintiff claims, was therefore posterior in date and docketing, to the Cleveland judgment under which the defendant claims. The plaintiff then is asserting superior title, under a judgment subordinate in rank as to date of recovery to the judgment upon which the defendant's rights depend. The plaintiff's title springs from a sale of the property upon an execution issued upon the Howard judgment. The defendant's title springs from a sale under a decree rendered upon a bill filed to enforce the Cleveland judgment, to which bill, the Milwaukee & Minnesota Company was sole defendant as the party in possession of the railroad and property, and to which bill and the decree so rendered, neither the La Crosse & Milwaukee Company nor the plaintiff was a party. As to the question of paramount title, this is the gist of the controversy; and it seems to lie within small compass. The sale to the plaintiff upon his judgment took place January 15, 1859. The sale to the defendant upon the Cleveland judgment occurred March 2, 1867.

This question of paramount title turns upon the point as to whether the defendant got a superior legal title by virtue of proceedings to which the plaintiff was not a party. A subsequent judgment creditor sells the property upon which his judgment is a lien, upon execution duly issued. A prior judgment creditor subsequently sells the property under a decree for the enforcement of his judgment lien, to which decree the person in actual possession is alone a party; who gets the better legal title?

It is contended with much force, that although the Milwaukee & Minnesota Company had been let into possession of the road, under the decree in the Bronson and Soutter case and was virtually holding the equity of redemption, yet, as that Company was subsequently at the suit of James and

others, enjoined from asserting any right or title to the property, because of the fraudulent character of the Barnes mortgage, and as the plaintiff was not a party to the decree upon the Cleveland judgment, and did not have his day in court in that proceeding, the defendant did not acquire superior legal rights by the sale under that decree. If the sale upon the Cleveland judgment had been upon execution, the plaintiff as a subsequent judgment creditor would have had the statutory right and period to redeem, of which he was deprived by the proceeding in equity which was taken. If he had been a party to the proceeding on the Cleveland judgment, he could have been heard to contest that judgment by showing payment or making other defence. These are some of the points urged by plaintiff's counsel, and it is insisted, that as the plaintiff was not a party to the proceeding upon the Cleveland judgment, his rights were not cut off nor affected.

It is to be borne in mind here, that we are not dealing with the equities of the parties in interest, but with their strict legal rights. True it may be, that the Barnes mortgage and the proceedings for its foreclosure were, as has been at different stages of the litigation claimed by different parties, including the defendant, fraudulent; I think I must nevertheless treat the Milwaukee & Minnesota Company as a corporation once having an actual existence. It has been so treated by the courts. It was recognized as such in the Bronson and Soutter case, by decree or order of court letting it into possession of the road, and for a period extending from January, 1866, to March, 1867, by permission of the court, it possessed, managed and operated this railroad and property. It was recognized by this court as a corporation in the proceeding upon the Cleveland judgment, and its existence throughout all the litigation was also continuously recognized by the Supreme Court of the United States. It was the party in possession of the property when the bill on the Cleveland judgment was filed, and when the decree was rendered.

Now suppose a second mortgagee forecloses his mortgage and takes title under his foreclosure sale, but does not take possession. Suppose then a prior mortgagee forecloses his mortgage, does not make the second mortgagee a party, takes title under his foreclosure sale and gets possession. Who has the paramount legal title? Clearly the prior mortgagee, but the second mortgagee's right of redemption is not cut off, because he was not a party to the proceeding. Let us follow it further. Suppose the prior mortgagee forecloses his mortgage, does not make a second mortgagee a party, and gets title under a foreclosure sale. The second mortgagee is in possession holding title under a foreclosure of his mortgage. The paramount title is again in the prior mortgagee, but he cannot have a writ of assistance or other process in his foreclosure proceeding against the second mortgagee to get possession of the premises, because that second mortgagee was not a party to his suit. The equity of redemption of that mortgagee is not cut off, and if the prior mortgagee would get possession, in case the second mortgagee does not redeem, he must bring ejectment. I mention these only as illustrations of the general principle.

Now a judgment creditor with a posterior lien issues execution, sells the property, and takes title. A prior judgment creditor prosecutes his bill in equity to enforce the lien of his judgment. The party in possession is sole defendant in the bill. A decree is rendered, enforcing not any lien created by the decree, but the lien of the judgment as of the date of the judgment, and a sale is ordered. The sale transpires and then a contest arises upon the legal titles held respectively by the purchaser under the decree and the purchaser under the execution sale upon the subsequent judgment. I cannot come to any other conclusion than that the purchaser under the decree founded upon the first judgment in this state of the case takes the paramount legal title. True, the plaintiff was not a party to the bill filed upon the prior judgment, but the omission to make him a party did not give him superior legal rights.

For rank of legal title we must look to the judgments from which the respective titles flow. In settling legal rights we must give him superiority whose lien was first acquired. By omitting to make the plaintiff a party to the bill upon the Cleveland judgment, the plaintiff was not cut off from certain equitable rights which under the law had accrued to him in his position as a subsequent judgment creditor. If when the decree was rendered upon the Cleveland judgment, and when the sale was made under that decree, the plaintiff had been in possession of the premises, he could not have been dispossessed by any writ issued in the equity suit, upon the principle that a writ of assistance cannot go against a stranger to the record in a foreclosure case. The only remedy which the defendant could have resorted to against the plaintiff, had the latter been in possession, would have been ejectment. But it is said the plaintiff lost his right to make the statutory redemption which he could have exercised had the sale upon the Cleveland judgment been made upon execution. This may be true. But certainly a court of equity would have given him the right to redeem. The plaintiff could have filed his bill and if there were no questions involved except priority of lien, a court of chancery must have granted to him the privilege of redeeming. In holding the defendant's legal title paramount, the rule that if subsequent incumbrancers are not made parties, their rights are not bound by the decree, is not transgressed. The proceedings under the Cleveland judgment did not cut off the plaintiff's rights. He stood after that decree as he stood before. No process could run against him on that decree, because he was not a party. But his legal title was all the time held subject to the prior judgment lien. That lien could be made effectual by a sale as ordered, and the sale culminated in a title paramount, because the standing of the titles depends upon the rank in time of the judgment liens, and the purpose to be subserved in making the plaintiff a party would have been to cut off his equity of redemption, and as he was not made a party that equity

was not extinguished, and so as to such equity he was left in the position he was in, before the decree upon the Cleveland judgment.

I understand the decision in *Terrell vs. Allison*, 21 Wallace, 289, to be that process cannot issue to enforce a decree against one not a party to the suit. The purchaser of mortgaged premises was in possession, and was not a party to the foreclosure. The decree provided that the purchaser at the foreclosure sale be let into possession, and a writ of assistance was issued against the person in possession not a party to the foreclosure. It was held that this could not be done, as the party's rights were not affected by the decree. But as the mortgage lien was prior to his purchase, can it be doubted that the purchaser at the foreclosure sale could have maintained ejectment against the occupant, and that his legal title was paramount?

In *Hickey vs. Stewart*, 3 Howard, 750, the heirs of James Mather brought ejectment. The defendants to support their possession relied upon the record in a suit in chancery in which the heirs of Starke were complainants and the heirs of Mather were defendants, in which suit it was decreed that the right to the land was in complainants, and Mather's heirs were ordered to convey to complainants and to deliver to them possession, and the writ of *habere facias* was awarded. The defendants in the ejectment suit got possession under this decree. But it was held that they could not successfully defend under that decree against the plaintiff's title, the decree giving only an equitable right. This case is cited here in support of the theory that the defendant's interest as purchaser at the sale under the decree upon the Cleveland judgment is only an equitable interest, and that the decree gave only an equitable right which cannot prevail against a legal right. But the whole reason for the ruling of the court in the case of *Hickey vs. Stewart* was that the defendants in the equity suit were not within the jurisdiction of the court when the decree was rendered, could not for that reason be compelled

to convey the title to the land, and had not conveyed, and until they should convey according to the decree, the defendants had nothing but an equitable estate under the decree. The doctrine of that case, it seems to me, is not applicable to this, because here the court had jurisdiction of the parties before it, made a decree of sale, and a sale was had and a legal title vested thereby under which the defendant entered upon possession. But it is argued that if the plaintiff had been made a party to the bill upon the Cleveland judgment, he could have contested that judgment by showing that it had been paid, or was not an existing judgment, or the like, and that he did not have his day in court so to do. He has however his day in court when he comes to try legal titles, and in that contest to defeat defendant's title, may show that the judgment had been paid and so did not exist at all as a basis for the decree, or that the entire proceeding was void and that consequently there is no foundation for the defendant's title.

It is also contended that, although the Milwaukee & Minnesota Company was in possession of the railroad and property when the decree upon the Cleveland judgment was entered, as, at the suit of James, the Barnes mortgage was held fraudulent and that company was enjoined from asserting any right or title to the property, and as that ruling involved the conclusion that the company had no interest in the property, the defendant is estopped now to claim that it had any interest or title which could be accquired by the sale under the decree upon the judgment. This position is taken upon the theory that the sale upon the Cleveland judgment was merely a sale of the supposed interest of the Milwaukee & Minnesota Company in the property, and a sale of that interest alone, it is forcibly urged, could not prevail against an execution sale of the interest of the original judgment debtor on the Howard judgment. But the radical difficulty with this position is, that the defendant's title does not have for its source the supposed interest of the Milwaukee & Minnesota Company in the property. The maintenance of

defendant's title does not depend upon a claim that the Milwaukee & Minnesota Company had a valid, transferable interest in the property. Indeed the bill upon the Cleveland judgment asserts affirmatively the fraudulent character of that company's alleged interest and claims. The interest sold upon the James decree relates back to the date of the Cleveland judgment, as the interest sold upon the Howard judgment relates back to its date. The terms of that decree were, that the Cleveland judgment was a lien charge and incumbrance as of the date of October 7th, 1857, upon all the right, title and interest which the La Crosse and Milwaukee Railroad Company had of, in and to the La Crosse & Milwaukee Railroad from Milwaukee to Portage, and a sale was accordingly ordered. The lien enforced by that decree was the lien of the judgment. The sale under the decree passed the actual property covered by the lien and the interest of the company existing at the time of the rendition of the judgment. It was so held by the Supreme Court on the appeals that were taken in the James case upon the Cleveland judgment.

Justice NELSON says this judgment became a lien on the road from the time of its rendition, and that the sale under the decree in chancery, followed by conveyance and confirmation, passed the whole of the interest of the company existing at the time of its rendition, to the purchaser.[1] I do not see therefore, that by standing upon this title, the defendant is claiming as against any previous assertion that the Milwaukee & Minnesota Company had a valid interest in the property sold, nor does that title vest upon such supposed interest. It has its source in the judgment and lien, and not in any title of the Milwaukee & Minnesota Company, nor in the decree rendered upon the judgment; and here I think *Chautauque Bank vs. Wrisley*, 19 New York, 371, is to be distinguished, for there the title rested upon the debtors own conveyance, made under direction of the court, and had no relation to the judgment.

1 *Railroad Company vs. James*, 6 Wallace, 750

The creditor did not fall back upon his legal remedy, but the title sprang from a conveyance by the debtor to a receiver and then a sale by the receiver. There was, as Judge COMSTOCK says, an abandonment of the prior judgment lien, and the whole title of the defendants came from the conveyance of the debtor himself made by order of a court of chancery, which conveyance could not cut off subsequent judgment liens so as to affect a title acquired under them. But in the case at bar the creditor stood upon his lien although equity was resorted to to enforce it. The judgment and lien, not the conveyance of the party, are the source of title.

The remarks I have made in relation to an estoppel arising upon the record in the suit of *James et al. vs. The Milwaukee & Minnesota Company et al.*, apply to the same question in connection with the record in the case of the defendant against the Milwaukee & Minnesota Company.

I do not think the plaintiff has shown a right to recover against the defendants, concluding as I do that the defendant has a paramount title. I will let the testimony offered by the plaintiff and objected to by defendant stand in the case, and must direct a verdict for defendant.

and setting up that he purchased and paid for the goods and accounts the sum of thirteen thousand dollars in cash, and that the purchase was in good faith and without any intent on his part, or knowledge of any intent on the part of the bankrupt, to defraud his creditors.

William F. Vilas, for complainants.

Gregory & Pinney, for defendant.

Hopkins, J.—The testimony read on the hearing shows beyond a question the insolvency of the bankrupt, and that he intended by the sale to defraud his creditors. This was not disputed by defendant's counsel, but the purchase was sought to be maintained upon the ground that defendant had paid a fair price for the goods, and bought without any knowledge of the bankrupt's circumstances, and without reasonable cause to believe him to be insolvent, and without any knowledge or belief or reason to believe that he was intending to defraud his creditors.

The bankrupt law, § 5130, R. S., makes a sale of debtors' property "not made in the usual and ordinary course of business of the debtor, *prima facie* evidence of fraud." The ordinary course of business of the debtor here, was to sell at retail, and a sale of the whole stock, including accounts and other effects, was clearly outside of his ordinary business, consequently presumptively fraudulent.

A case involving such a sale was before the Supreme Court of the United States, *Walbrun vs. Babbitt*, 16 Wallace, 577, and it was then held that a sale of retail dealer of his entire stock at once was out of the ordinary course of business of such dealer, and fraudulent, and that the presumption of fraud arising from the unusual nature of such a sale could only be overcome by proof on the part of the buyer that he used all reasonable means to ascertain the pecuniary condition of the seller before making such purchase.

The law casts upon a person purchasing an entire stock of a retail trader the obligation of investigating his condition and motives for such a sale. It pronounces such a sale fraudulent *prima facie*, and the purchaser must be prepared to overcome that presumption by showing it to have been honest, or that upon vigilant inquiry no reason appeared to doubt its honesty. It is not enough to show that he did not know that the debtor's intentions were to defraud his creditors. The law told him they were, and he should have investigated and ascertained as a fact that they were not. As I have before said, in this case there was no controversy but that the bankrupt made the sale to defraud his creditors, just what the law presumed he did it for, and I do not see, therefore, how the sale can be sustained; the *prima facie* case is not overthrown, but on the contrary, is fortified by the evidence that the defendant's counsel on the hearing did not attempt to deny that the debtor intended just what the law presumed from the character of the sale, to-wit: to defraud his creditors.

The ignorance of the defendant of the condition and purposes of the bankrupt in making such sale does not defeat this presumption, even if that was established. He should have shown either that the sale was honest in fact, or that from a thorough examination of the seller's affairs he had reasonable cause to believe it to be so, which he wholly failed to do.

But I do not wish to rest my decision alone upon the legal presumption. The evidence supports the charge that the sale was made with intent to defraud the bankrupt's creditors. I do not believe the testimony that the defendant paid $13,000 in cash at that time. The evidence of the defendant and the McDonalds on that question is incredible, and cannot be true.

The transaction as stated by defendant was substantially this: Siegrist on the 10th of December went to New York to see about making some arrangement about his debts, leaving the defendant in charge of his business at Wausau. He

wrote to defendant once while there to send him money to pay his expenses; that he returned on the 27th of January following about noon, and that before tea-time of that day the agreement to sell his entire stock of goods, together with his accounts and all other effects at the price of $13,000 was made; that defendant had $5,000 in cash in his possession at that time, $1,500 of which had been paid to him that day by Mr. Siegrist for gold sold to him while in New York; that before tea he went out and found two young men by the name of McDonald, and borrowed of them $7,000—$4,000 of one and $3,000 of the other; that he also borrowed $1,000 of one Kemp, and that the money was placed in the safe for Siegrist that night.

The defendant was a saloon keeper, and his wife kept a small millinery and dress making shop. He, in company with another party bought the saloon of the McDonald boys in July previous, for $1,500, and paid down $600 and got time for the balance by giving a chattel mortgage on property as security. He claims that he had then in his possession $5,000, among which there were three $1,000 bills. He says he got in the money borrowed from the McDonald boys, four more $1,000 bills, and that he paid Siegrist seven $1,000 bills, that on the morning of the 28th he had a formal bill of sale prepared by his attorney, and that the parties and his attorney went to another attorney's office where it was executed and witnessed, and the money was handed over in a package said to contain $13,000, but not counted then by any one, in the presence of this attorney who was used as a witness of the execution of the paper and the passing over the package; that this was before the parties had breakfasted; that the defendant engaged the evening before, at the livery stable, a team to take Siegrist to the railroad at Stevens Point in the morning; that after getting the money Siegrist went away, claiming that he was going to Milwaukee and Chicago to settle his debts, but never returned; that he was owing his clerks and various parties, including his banker, quite a large sum, which

he did not pay, and thereupon defendant took possession of the goods; that he did not give the McDonalds any security for the $7,000, nor Kemp for the $1,000, but gave Kemp notes for about $700 against customers and paid him $270 in money the next day, and took up his own note.

Now this story is so strange and unusual, not to say absurd, as to effectually refute itself. The idea that he had such an amount by him, is negatived by his whole life and conduct. There were two responsible banking houses in Wausau, and although he resided there about eighteen months, he had never kept a bank account, but had, as he says, his money in a trunk in his room in the hotel, where he boarded, before his marriage, and after that in his house. If he had that money, why did he get time in purchasing the saloon of the McDonalds in July previous, and why did they then require a chattel mortgage to secure the balance of the purchase price, $900, when they let him have $7,000 on the day of the sale, without any security but his note? Men with money do not do business in that way, and I cannot credit such evidence. He refused on his examination to divulge his business or his whereabouts during several years of his life, and I think hereafter he should class this transaction and his testimony here among the list of unmentionable acts. The shallow trick of going before an attorney ignorant of the facts and circumstances of the trade, to get him to witness the very formal bill of sale prepared by his own counsel, is an additional circumstance of the fraudulent nature of the whole matter. Such artifices are often employed to give character to a dishonest act, but it is very seldom they do any injury to any one except the party resorting to such practice.

If this sale was made to raise money to pay debts, as he claims he thought it was, why did they go to the office of another attorney to get him to witness the bill of sale and see the money paid over, instead of having their own attorney who prepared the papers and who would naturally be supposed to know something about the affair, sign it and witness

the transaction? This part of the affair seems farcical. It seems strange that parties should think that courts could be deceived by such weak inventions. It is unnecessary to consider his testimony further. The transaction was wickedly corrupt and all the parties connected with it were guilty of a most flagrant attempt to defraud the creditors and parties who had confided in Siegrist's integrity, and sold him these very goods on credit.

It is true that the McDonalds corroborated the story of their lending the money. They made out that they loaned him $1,000 more than he wanted, but their characters and business do not warrant a court in giving their story credit. They had been saloon keepers, and sold out to defendant, and had a chattel mortgage to secure them. They were river pilots, and as they themselves swear, quite extensively engaged in gambling, and, in short, they do not account for their having any such amount of money in their possession, and I don't believe it. They probably had some money, but I think if they had had much, they would have loaned it, as the evidence showed they had some time before to the wealthy lumber-men residing there, or have placed it in one of the banks. The story is not such as to receive credit. It it too unreasonable and unnatural. They may have let defendant have some money, and probably did. Siegrist came back knowing he could not pay. He had been sued, and over $1,000 of his debts were past due. He had doubtless made up his mind to abandon the whole concern, and get what he could and flee the country, and the defendant and the McDonalds were just the kind of characters to embark in such a scheme; and I presume they got together what they could and paid over to him, and thought they could cheat the creditors out of their pay. The nature of the transaction and circumstances of the men, convince me that such was the case and object of the parties. It was a bold, wicked fraud, and has been sought to be maintained by what I cannot but regard as false and corrupt swearing.

I direct that the pretended sale be set aside and declared void, and that the defendant must account for any property he sold or converted, and for all debts that he collected during the time he was in possession under such fraudulent purchase. He must also be enjoined from further prosecuting his suit against the Marshal, or any other party for the recovery of said goods or accounts, or any part of them, or from commencing any other or further suits for such purpose.

An objection was taken to the jurisdiction of this Court to enjoin the prosecution of the suit against the Marshal in the state court. It was argued that it was like the case of *Buck vs. Colbath*, 3 Wallace, 334, but I do not think it falls within the doctrine of that case. Here the Marshal siezed the property and delivered it to assignees, and the assignees, by the order of the court, sold it and placed the proceeds in the registry of the court to abide the result of the claimants' rights therein before the suit was commenced in the state court. This court had therefore taken the property, and it alone should have the right to determine the question as to whom it belonged. This is a suit to set aside a contract, upon grounds created and established by an act of Congress—the bankrupt law—and doubts have been intimated by the Supreme Court of this state, of the jurisdiction or duty of the state courts to grant the relief authorized by that law.[1] Such a suit is a suit arising under the laws of the United States, and this Court has jurisdiction. The federal courts are the appropriate tribunals for the trial and hearing of such cases, and as the rights of the parties rest upon the provisions of the laws of the United States, the parties have the right to the decision of the Supreme Court of the United States upon them. After they shall have litigated the case all through the state tribunal, the unsuccessful party may have writ of error from the state court to the United States Supreme Court. It is not, therefore, an unwarrantable interference with the jurisdiction of the state courts.

1 *Brigham vs. Claflin*, 31 Wisconsin, 607.

This suit has a broader purpose than the suit in the state court. It is to protect the fund in the registry, and to settle the rights of the creditors and defendant to it, so that when these are settled it may be either paid over to the defendant or distributed without further delay among the creditors.

The case of *Kellogg et al. vs. Russell et al.*, 11 Bankruptcy Register, 121, was a case like this, and Judge WOODRUFF held the suit was maintainable. The case of *Marsh & Palmer vs. Armstrong*, 11 Bankruptcy Register, 126, decided by the Supreme Court of Minnesota, was held to be substantially like the case of *Buck vs. Colbath*, *supra*. It did not appear in that case that the United States District Court had taken any control of the property, only that the Marshal had siezed it by virtue of a warrant which directed him to take the bankrupt's property, like an ordinary execution. But in this case, before the case in the state court was commenced, the Marshal had delivered the property to the assignees and the court had taken possession of it and expressly held the proceeds to await the issue of the defendant's claim of ownership. Under such circumstances I think the question of title to the avails was pending in this court when that suit was commenced, and the state court had not jurisdiction of the question. Under such circumstances this Court cannot surrender its jurisdiction.

This circumstance distinguishes this case from the one decided in Minnesota.

The prosecution of suits against officers of the federal courts in this state, who can alone defend under the provisions of the bankrupt act, when the state courts refuse to enforce those provisions, is placing such officers in unreasonable jeopardy; and when they institute proceedings to test their titles in courts, decided by this state to be the appropriate courts to settle them, to be met with the objection that suits are pending in the state courts, is ungracious, to say the least, and I do not think the objection maintainable. I think this is the appropriate tribunal to determine the controversy, and that it is not an unwarrantable interference with the jur-

risdiction of the state courts, but a proper and eminently just, if not absolutely necessary, exercise of jurisdiction in this state, in view of the law as settled by the state courts in such matters.

The objection to the jurisdiction is overruled, and a decree is ordered for complainants, as before directed, and that it be referred to a master to take an account of the property converted and accounts collected and not paid over by defendant.

To set aside a mortgage as a preference, void under the Bankrupt Act, it is not necessary to find that the mortgagees knew the condition of the bankrupt and his intentions. It is sufficient if they had reasonable cause to believe him insolvent, and if they had notice of facts sufficient to put them on inquiry they are chargeable with knowledge which an investigation of the bankrupt's condition would have developed. *Burpee vs. First National Bank of Janesville*, 5th Volume of this Series, 405.—[*Reporter.*

WM. P. BURDICK vs. JUDSON HALE *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1876.

1. REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT—ACT CONSTRUED.—The jurisdiction of a state court over a controversy rightfully in its possession, cannot be dislodged except by fully complying with the requirements of the acts of Congress authorizing the transfer of causes from the state to the federal tribunals.

2. INSUFFICIENCY OF BOND.—A bond given in pursuance of the act of March 3, 1875, in regard to removal of causes from the state to the federal courts, in which the place where the penal sum should have been inserted is left blank is insufficient; for although an undertaking to pay an indefinite amount would have satisfied the act, no sum being named as a penalty, no liability is created.

3. CONDITION OF BOND.—Where the act requires that the condition of the bond shall be that the party removing the suit will enter in the Circuit Court of the United States, on the first day of its next session, a copy of the record in such suit, and for paying all costs that shall be awarded by said Circuit Court, and the condition in the bond given, is that plaintiff shall file in the Circuit Court "copies of all process," such bond is insufficient.

Edwin H. Lamme, for plaintiff.

Harrison, Hines & Miller, for defendant.

GRESHAM, J.—On the 15th day of December, 1869, judgment was rendered in the Marion civil Circuit Court in favor of the defendant, Julia Hunt, against her co-defendant, Judson Hale, on her cross-complaint, in which she alleged that she was the owner of the note sued on by the plaintiff. On the 10th day of December, 1873, the Supreme Court of the state reversed this judgment and remanded the cause for a new trial. On the 14th day of October, 1874, the plaintiff, who was a citizen of the State of New York, filed his petition in the state court for the removal of the cause to this court, on the ground that from prejudice and local influence he would

not be able to obtain justice in the state court, and with said petition he filed a bond.

On the 29th day of May, 1875, the state court, on the motion of the plaintiff, accepted the bond and ordered that no further steps be taken in the cause in that court.

The defendants now appear and move to remand. It will be observed that the application for removal was under the act of March 2, 1867, and action by the state court was delayed on the same until after the passage of the act of March 3, 1875.

Was there such a compliance with the act of 1875 as divested the state court of jurisdiction?

The bond is penal in form, but the place where the penal sum should have been inserted is left blank. An undertaking to pay an indefinite amount would have satisfied the act, but this instrument is not an agreement to pay anything. No sum being named as a penalty in the contract, it created no liability. But if the bond were not open to this objection, it is insufficient for other reasons. The condition is that the plaintiff shall file in the Circuit Court of the United States "copies of all process" in the action and cross-action.

Section 3 of the act of 1875, declares that the party entitled to remove the suit shall file with his petition for removal a bond, with good and sufficient surety, for entering in the Circuit Court of the United States, on the first day of its next session, a copy of the record in such suit, and for paying all costs that shall be awarded by the said Circuit Court, if said court shall hold that said suit was wrongfully or improperly removed thereto. The act clearly requires that the party on whose petition the suit is removed shall give a bond to do more than file copies of the process in the federal court. The surety on this bond will be liable for no costs if this suit is sent back to the state court.

If, as was intimated in argument, the act of 1867 was not repealed by the act of 1875, the plaintiff is equally unfortunate, for he failed to comply with the requirements of that

act by offering good and sufficient surety for his entering in the court copies of "all process, pleadings, depositions, testimony and other proceedings in said suit," and for doing such other appropriate acts.

But it was held in the Danville railroad case, 6 Bissell, 330, that the act of 1875 repealed the act of 1867, and that ruling must be accepted as law in this district.

It will not do to say that the requirements of the act as to the filing of a petition and bond in the state court are merely directory, and that such defects in the bond as have been pointed out in this case may be cured by amendment in this court.

Congress has prescribed the mode for removing causes from the state to the federal courts. The federal courts have no power to dispense with, or modify, or change, any of the provisions of the statutes authorizing the removal of causes from one jurisdiction to the other. Unless the requirements of the act, which are jurisdictional pre-requisites, are substantially complied with, the power of the state court remains undisturbed. If in this case the requirements of the statutes have been substantially complied with, the state court has lost jurisdiction over the suit, and no amendment of the bond is necessary to complete the jurisdiction of this court. If, on the other hand, the requirements of the act have not been complied with, the suit is still in the state court, and there is nothing in this court to amend. The jurisdiction of the state court over a controversy rightfully in its possession, as in this case, cannot be dislodged except by fully complying with the requirements of the act of Congress authorizing the transfer of causes from the state to the federal tribunals.

It was further urged in support of the motion to remand, that the suit having been once tried in the state court, it was too late to remove it to this court under the act of 1875. But in view of what has been already said as to the insufficiency of the bond, it is not necessary to rule upon that question.

The motion to remand is sustained.

NEWARK SAVINGS INSTITUTION vs. PANHORST *et al.*

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—MARCH, 1876.

1. MEASURE OF DAMAGES—REFUSAL TO PLACE JUDGMENT ON TAX LIST.—The highest damages which will be allowed in the United States Courts, against the Supervisors of a town for a refusal to put a judgment on the tax list, even though a mandamus shall have issued, will not exceed a counsel fee and costs.

The facts will be found stated in the opinion.

John M. Palmer & John Mayo Palmer, for plaintiff.

Lyman Trumbull, John J. Rinaker, C. A. Walker and *W. R. Welch*, for defendants.

DRUMMOND, J.—This is an action on the case to recover damages for non-performance of a duty by the defendants, as supervisors of the county of Macoupin.

The plaintiff recovered two judgments in this Court against the county of Macoupin, amounting, altogether, to over $100,000, and writs of mandamus were issued, requiring the supervisors to levy a tax of one per cent. of the assessed value of the property in the county, to pay the judgments. The writs of mandamus were issued on the 24th of May, and the 28th of August, 1873, respectively. They were served upon the Board of Supervisors of the county, and the defendants all had notice of the fact that writs of mandamus had been issued, independent of the general obligation which the law imposed upon them to discharge the duty. The attention of the defendants was, therefore, in these writs, specially called to the duty incumbent upon them, to impose a tax to pay the judgments.

They willfully disregarded and disobeyed these orders of the court; in other words, violated a solemn obligation.

For this disobedience to the order of the court, and for the non-performance of the duty required by the law, this action was brought, and the only question is, what is the amount of damages that can be recovered in the case.

It may, perhaps, be said, although it can hardly be considered as proved in the case, but still it has been argued somewhat upon that undisputed fact, that, for this disobedience to the orders of the court, the parties were fined, and the fine was paid. But it was not paid by themselves. They took the money of the county and paid the fine. And these fines were, it is understood, appropriated in part to the payment of costs.

A decision of the Supreme Court of the United States, not yet reported, *Dow vs. Humbert et al.*, 91 United States Reports, 294, has restricted us very much as to the *quantum* of damages which should be allowed in a case like this. That court has decided, in effect, that the measure of damages is not the amount of the claim. At the same time it is stated that if the plaintiff has sustained any special damages, they can be recovered.

Looking at the whole case, without going into the reasons which have influenced the conclusion, and regarding the decision above referred to as allowing nothing more than *quasi* nominal damages, we have determined that we will give the plaintiff some compensation for the trouble to which it has been put in consequence of the non-performance of a duty by the defendants, in the employment of counsel, and for the labor and expense, without defining it in any precise form or language.

In the case of *Dow vs. Humbert et al.*, *supra*, a demand was made on the officers of the town to place upon the tax-list the judgments then in question, which was necessary under the laws of Wisconsin, before the judgments could be paid. That was not done. The Supreme Court thereupon

assumed that it might have been in consequence of ignorance, inadvertence, or mistake on the part of the officers, although it does not exactly appear how, or under what circumstances that inference was drawn.

There certainly can be no such assumption here. In that case there were allowed only nominal damages. Here the case is infinitely more aggravated. In fact it is as much so as it possibly can be. It is a case where the defendants have set at defiance the orders of the court—orders they were bound to obey—a case in which they were as guilty of violation of an imperative duty as men well can be. This court is a part of the institutions of their country, just as much as the Circuit Court of Macoupin county. They are just as much bound to obey its mandates as though it was a court of their own county. They have chosen deliberately to disregard them.

It is said, indeed, that we have punished them, and can punish them again. That is true, but this is an action brought for the violation of a public duty, which has resulted, it is claimed, in pecuniary loss to the plaintiff. So that it is a case where we think we may go further than the Supreme Court said they could go in the Wisconsin case. But at the same time we feel restricted, as I have said, by the rulings of the Supreme Court, and, while we give some damages, after all they will amount to not much more than nominal damages.

We will allow five hundred dollars to the plaintiff, and eighty-five dollars for the payment of the money for notices.

The judgment of the court will be therefore for the plaintiff for the amount of $585 and costs.

The parties who were not present at the meeting of the board of supervisors at which the act of disobedience occurred; as well as those who voted for the imposition of the tax, as directed by the writs, are not, of course, included in this judgment.

I ought, perhaps, to add, that our view was, if we were left free by the decision of the Supreme Court, that the

plaintiff would at least be entitled to the interest upon the money which would have been collected, if the defendants had performed their duty.

The presumption is, the plaintiff could have had the use of the money, and, in one sense, might have compounded the interest. But we think we are not at liberty, under the decisions of the Supreme Court, to allow it. That court seems to think that as the interest is still due and payable, and may be included with the principal, that is all which can be allowed.

We have also thought that there has not been, within the meaning of the Supreme Court, any substantial "impairment" of the responsibility of the county. It is true, that the assessed value of the property of Macoupin county was much less in 1875 than it was in 1873; but still it appears that the property is sufficient to enable the county to pay. At any rate, the fund out of which these judgments are to be made is sufficiently large to enable the plaintiff to avail itself of the laws to recover the amount.

It is also true, that under the decisions of the Supreme Court, these judgments against municipal corporations, where people do not choose to pay them, are not very potential. It has held that where the laws of a state declare that there can be no execution against the property of a municipal corporation the federal courts are without power to collect judgments by the imposition of taxes, although that may be the only resource.[1]

And now it has been decided, substantially, that the officers of such corporations are not liable for more than nominal damages, if they refuse to perform the duty which the law imposes on them. The result is, judgments can be obtained in the courts against these municipalities, upon the bonds or coupons they have issued, and their obligations construed with the greatest rigor, but after judgments, and when it is

1 *Rees vs. Watertown*, 19 Wallace, 107.

attempted to make their property available to satisfy them, then arises the real difficulty of the case, in the effort to overcome which, the old legal maxim, that there is no wrong without a remedy, seems sometimes to be reversed.

HENRY HERVEY *et al.* vs. THE ILLINOIS MIDLAND RAILWAY COMPANY.

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—MARCH, 1876.

IN EQUITY.

1. REMOVAL OF CAUSE FROM STATE COURT.—A part of a controversy only cannot be removed, but the case must be so removed that it can be wholly determined.

2. FOREIGN CITIZENSHIP.—Foreign citizens, where they do not constitute the entire plaintiff or defendant cannot remove a suit, as the suits contemplated by the act of March 3, 1875, are those between citizens of one of the states of the Union on one side, and foreign states citizens or subjects on the other.

3. NOMINAL PARTIES.—Where parties are merely nominal and have no actual interest then their citizenship will not affect the question of removal.

Bishop & McKinlay, for plaintiffs.

Robert G. Ingersoll, for defendants.

DRUMMOND, J.—An original bill was filed in the Edgar County Circuit Court, on the 11th of September, 1875, by one Henry Hervey, who claimed to be owner of the majority of

the stock of various railroad companies, the Paris & Decatur Railway Company, the Peoria, Atlanta & Decatur Railway Company, and the Paris & Terre Haute Railway Company, all of which had been merged in the Illinois Midland Railway Company, and which was made a defendant. The only plaintiffs in the original bill were Hervey, and some judgment creditors of the Peoria & Decatur Railway Company.

The original bill alleged that there were very large claims in judgment and otherwise against these various companies, and that executions had been issued; and that owing to the purchase by the Peoria, Atlanta & Decatur Railway Company, of the other roads, it could not be ascertained how the judgments could be collected or appropriated, and therefore asked for the appointment of a receiver.

The claims outstanding—what are called the floating debts of the company—were said to be something over three hundred thousand dollars.

A receiver was appointed. An amended bill was then filed which set out in more detail the various facts stated in the original bill and also included numerous plaintiffs besides those in the original bill.

These various parties were stockholders of the road, and also judgment and other creditors, and it was stated in the amended bill that if the property was placed in the hands of a receiver, and thus a foreclosure prevented by the sale under execution of the property, the company might be placed upon a stable footing, and that something might be realized for the stockholders and the creditors.

The receiver took possession; various applications were made by him to the court; money was paid under the direction of the court, and contracts also entered into with approbation of the court, by which the receiver became liable to pay certain moneys from time to time, and to issue certificates, (a very objectionable thing which, however, the courts have to some extent countenanced of late, while the property is in possession of the receiver; but it is only to be permitted, I

think, under extraordinary circumstances) so that the Edgar Circuit Court had retained possession of this property for a very considerable time. The only defendant to the original and amended bill, was the Illinois Midland Railway Company.

This was substantially the condition when in February, two creditors, Albert and Morris Grant, citizens of Great Britain, and representing themselves to be bondholders of all these various companies merged into the Illinois Midland Railway Company, came into court and asked to be made parties defendant, and also for leave to file a cross-bill. At the same time Secor, representing himself to be trustee of the mortgage executed by the Peoria, Atlanta & Decatur Railway Company, asked to be made a party. An order was accordingly made by the court. The order seems to have anticipated the actual application, the order being on the 7th of February, and the application not being in fact made in the clerk's office until about the 15th of February. This, perhaps, is not material. They were made parties, on leave given by the court. They then filed answers to the original and amended bills, in which Secor set up that he was mortgagee and trustee of the Peoria, Atlanta & Decatur road; that he represented thirteen hundred thousand dollars for which the mortgage was given; that the plaintiffs were seeking to make the property, which he states was covered by the mortgage, available to them to pay the claims which they had against these companies, and alleging an independent fact, that the Midland Railway Company, and all these companies, were insolvent; that they had not property enough to pay the various mortgage debts against them; and that the bonds secured by the mortgage were a prior lien over the claims represented by the various claimants in the original and amended bills.

These were also the substantial allegations of Albert and Morris Grant, with the exception that they represented in their answer that they were bondholders of these three companies. They allege also that there was a mortgage made by the Paris & Decatur road, of which they held bonds, and also

by the Paris & Terre Haute road, of which they were the owners of the bonds, but who the mortgagees and trustees were they do not say. All that is stated is that there were mortgages or deeds of trust to secure bonds of which they were the holders.

Now this was the status of the case when, on the 16th of February these defendants, Albert and Morris Grant and Secor, filed a petition in the clerk's office of the Circuit Court of Edgar county, to have the cause removed to this court, for the reason that there was a controversy which could be wholly determined as between the trustee and these bondholders and the plaintiffs in the original and amended bills; and if that were so there would be no objection in one aspect of the case for the court to take jurisdiction, because the language of the law is, that when the controversy is wholly between citizens of different states, the court may have jurisdiction, although perhaps the implication is, there may be other controversies in the case between other parties.

It can hardly be said that is true in this case. For instance, in the original and amended bills, there is no allusion whatever to any of the bonds issued—to any paramount claim over that of the stockholders and the judgment and other creditors. But it is insisted that the property, if put in the hands of a receiver, and taken care of, and an arrangement made by which the floating debt can be paid off, can become valuable to the stockholders; and there is nothing in the original or the amended bill to indicate that the Midland Railway Company, which is a citizen of this state, has no interest in the property. And it is manifest that the case cannot be transferred without affecting the interest of the Midland Railway Company very seriously, and the only ground upon which it could be transferred by these bondholders and this trustee is that the Midland Railway Company is a mere nominal party.

If it is a real party, it being one of the defendants as well as the bondholders and the trustee, it is a controversy between

that company as one of the defendants and the judgment and other creditors, the plaintiffs in the original and amended bills, and therefore it cannot be wholly determined as between these parties who seek for a removal.

But, independent of that, it appears that Albert and Morris Grant are citizens of Great Britain. They are not citizens of one of the states of this Union, as we think they must be within the meaning of the last clause of the second section of the act of the 3d of March, 1875, under which this case is sought to be removed.

[1] "Between citizens of a state and foreign states, citizens or subjects," is one of the conditions under which the federal court has jurisdiction. Now "citizens of a state" there means citizens of one of the United States, and the suits contemplated are suits between citizens of one of the states of the Union on one side and foreign states or citizens or subjects on the other.

Then the next section proceeds to say, [2] "and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states," (that means different states of this Union—not citizens of one of the states of this Union and foreign states, citizens or subjects: and the suits referred to are the suits which can be fully determined as between them,) "then either one or more of the plaintiffs or defendants actually interested in such controversy may remove such suit."

Now, as I have said, we cannot determine the controversy, whatever it may be, between these parties seeking a removal, and the plaintiffs in the original and amended bills without affecting the controversy which may exist between the Midland Railway Company and them, and therefore it is not wholly a controversy between the parties seeking such removal and the plaintiffs in the original and amended bills.

Why there was this distinction made—why the language

1 § 18 U. S. Statutes at Large, 470.
2 § 18 U. S. Statutes at Large, 471.

was dropped in the last clause of the section which is contained in another part—it is not for us to determine. It is sufficient that the phraseology is changed, and seems to be limited when less than the whole of the plaintiffs or defendants have the right to remove the suit so that they must be citizens of different states of the Union, and the controversy must be wholly between them.

In this case it is not so. There is a controversy between citizens of the same state, namely, some of the plaintiffs, citizens of Illinois, and the Midland Railway Company, also a citizen of Illinois.

Again, it is stated in the application for removal, that some of the plaintiffs are foreigners. Waring & Company are bondholders, and are citizens of Great Britain and Ireland, and another party is a citizen of Canada. These are included among the plaintiffs in the amended bill.

Of course they are to be affected by the settlement of any controversy between the other plaintiffs and these defendants who seek a removal. For instance, if it is to be held that the trustee of the bondholders seeking the removal is to have a prior claim over the judgment creditors, then a foreigner is to be affected by that adjudication of the court, whatever it may be. So, in relation to the bondholders who are foreigners and plaintiffs, with the others.

It is not therefore in this aspect of the case a controversy wholly between citizens of different states, but it is a controversy between the citizens of a foreign country and citizens of one or more of the United States.

It has occurred to us as a question whether or not these difficulties may be removed, as in this very complicated case it has been suggested that it might perhaps be better for the interest of all parties that this Court should take jurisdiction of the case. But of course we can only take it where the law enables us to do so. It is said that the Midland Railway Company, which is the only other defendant, has no interest in this controversy. If it be true, if it is actually insolvent,

and all these various railroad companies of which it is the successor are also insolvent, and there is not more than enough, or not enough, to pay the bonded debt, then it may be that and the other companies are merely nominal parties. They may have no real interest in the controversy. So perhaps it might be if the stockholders were parties and the stock was of no value whatever.

The controversy then would be, whether the bondholders should have this property, or the judgment and other creditors represented in the original and amended bills.

But we cannot assume now, in the present aspect of the case, as it appears upon the record, that this is so. It is alleged on one side, it is true, but it is in an answer which has not, as yet, judicially come to the knowledge of the court, and this allegation is entirely different from that in the bill.

We think that it must affirmatively appear that the court has jurisdiction. These answers were filed in vacation. The state court has never had its attention drawn to them—they never have come under its judicial cognizance in any way. It is to be observed that the Midland Railway Company has never answered, and the Paris & Decatur Railroad, The Paris & Terre Haute Railroad, The Peoria, Atlanta & Decatur Companies have never appeared directly in the case, nor have their trustees or mortgagees, except Mr. Secor.

The Midland Railway Company may admit it, or it may appear to the satisfaction of the court that it has only a nominal interest, and so of the other parties named.

It may be remarked further there was no necessity for these bondholders, Albert and Morris Grant, to be made parties. The trustees could act for them, as there seems to be no antagonism or breach of duty on their part, especially under the allegation contained in Secor's answer, that he is requested by them to appear for the protection of the bondholders. He is so far actually interested, within the meaning of the last clause of the second section of the act of 1875, as to enable him to represent them, although he is a mere

trustee, yet as a trustee representing their interests, he can become a party to the suit.

So then, if it did appear, or shall be made to appear that these various railroad companies are only nominally interested, and are nominal parties to this controversy, if the trustees shall come in and desire to appear as defendants, for the purpose of directing and controlling the litigation, and if it shall prove that there is no other real controversy in the case, except between them as representing the bondholders and the judgment and other creditors of these various companies, and that they are citizens of different states—then we think that the court may take jurisdiction.

UNITED STATES vs. JACOB NUNNEMACHER *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—MARCH, 1876.

1. REVENUE LAW—INDICTMENT—WHAT PROOF NECESSARY.—It is not necessary to prove that the precise quantities were removed, in an indictment for removing distilled spirits on which the tax had not been paid; proof of any quantity removed, less or more than is alleged, upon which the tax has not been paid is sufficient.

2. TIME OF REMOVAL.—It is not indispensable to the prosecution that the removal of the spirits took place at the precise times stated; but it must be at, or about the time stated, and evidence of removals considerably anterior will be inadmissible.

3. REMOVAL AND CONCEALMENT.—In a count of an indictment for removal and concealment, conviction may be had if removal is proved, though concealment is not shown.

4. PROOF.—If a person in interest in the business of the distillery, for himself, either alone or with others, directed, prescribed, ordered or set on foot the alleged removal or removals of spirits, or aided or abetted therein, he may be convicted of such removal or removals, although he may not have been personally present at the time.

5. PRINCIPAL AND AGENT IN CRIME.—Where a person with unlawful purpose or intent designs the commission of a criminal act, and to carry out that purpose or effect the unlawful object, another is employed to do the act, that act becomes the act of the principal, and he as well as the agent is criminally responsible.

6. CONSPIRACY—WHAT CONSTITUTES.—A conspiracy is formed when two or more persons agree together to do that which is unlawful, and when one or more of the parties does any act to effect the object of such conspiracy. A mere agreement or combination to effect an unlawful purpose, not followed by any act, does not constitute the offense; there must be both the corrupt agreement or combination and an act done in pursuance thereof to make the punishable offense under the statute.

7. A general discussion of the law on the question of conspiracy. Many authorities cited and commented upon.

8. IDENTITY OF CONSPIRACY,—Is not destroyed by the connection at a subsequent time of new parties therewith.

This was a trial on an indictment for removal of distilled

spirits from a distillery to a place other than a distillery warehouse, and for conspiracy.

J. C. McKinney and *L. S. Dixon*, for the United States.

Winfield Smith and *James G. Jenkins*, for defendant Nunnemacher.

DYER, J., charged the jury as follows:

The indictment in this case contains four counts. The substance of the first count is, that on the 18th day of December, 1874, the defendant on trial, Jacob Nunnemacher, and the other persons named in the indictment, removed and aided in the removal of 3500 proof gallons of distilled spirits, on which the tax then due and owing to the United States, and required by law to be paid, had not been paid, from the distillery of the defendant, Christian Guenther, to the place of business of the defendant, August Hauske, and to a place other than the distillery warehouse of the said Christian Guenther, and concealed and aided in the concealment of these spirits.

The second count is like the first, except that the time of alleged removal and concealment of spirits is therein named as the 21st day of December, 1874, the quantity of spirits then alleged to have been removed is stated to be 3000 proof gallons, and the place to which and where they are alleged to have been removed and concealed is stated to be a railroad car in the city of Milwaukee.

The third count is like those that precede it, except that concealment is not charged, and except that the time of alleged removal of spirits is therein named as the 23d day of April, 1875; a railway car in the city of Milwaukee is the place to which these spirits are alleged to have been removed, and the quantity of such spirits is said to be 3500 proof gallons.

The fourth count charges, that on the 18th day of December, 1874, the defendants named in the indictment, including

the defendant, Jacob Nunnemacher, conspired together by producing and distilling large quantities of distilled spirits at the distillery of Christian Guenther, and to transport and remove the same from the distillery out of this collection district, without payment of the taxes required by law to be paid on distilled spirits, unlawfully to defraud the United States of the tax on said spirits; and as acts charged to have been done, to carry out the purpose of the conspiracy, it is alleged that on different days named in the count, the defendants produced and distilled at the distillery of Christian Guenther various quantities of spirits which are enumerated, and did not pay the tax thereon required by law to be paid, and removed such spirits from said distillery to a place and to places other than the distillery warehouse provided by law.

This is distinguished from the other counts, as the conspiracy count, in this indictment.

The first three counts are based on Sec. 3296 of the Revised Statutes, which provides, that "whenever any person removes or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed," he shall be liable to certain penalties.

The fourth count is based upon Sec. 5440 of the Statutes, which provides, that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable" to certain penalties.

Both in the testimony and the arguments of counsel, you have been informed, not only of the different processes involved in the distillation of spirits, but also of many of the requirements of law that must be regarded in carrying on the business. Among those requirements is one to the effect that there shall be a distillery warehouse connected with

every distillery, where all spirits manufactured at the distillery shall be deposited and kept under the charge of a government officer, until the tax thereon has been paid and until it may be lawfully removed therefrom for sale or other disposition; and it is, as we have seen from a statutory provision I have quoted, an offense for any person to remove or aid in the removal of any distilled spirits upon which the tax has not been paid, to a place other than the distillery warehouse provided by law.

To establish the offenses charged in the first three counts in this indictment, as against the defendant on trial, it must be shown:

As to the first count, that on the 18th day of December 1874, or at about that time, there were spirits at the distillery in question upon which the government tax had not been paid; that they were removed to the place of business of August Hauske, or after such removal were there concealed; that this was a place other than a distillery warehouse provided for or authorized by law; and that the defendant removed or concealed after removal, or aided in or abetted the removal or concealment of such spirits.

As to the second count, the same state of facts must be shown, except that the alleged removal or concealment of spirits must be proved to have taken place on the 21st day of December, 1874, or about that time; that the alleged removal was made to a place other than a distillery warehouse in the city of Milwaukee; and that the place of concealment was a railway car.

As to the third count, again the same state of facts must be shown, except that the alleged removal of spirits must be proved to have taken place on or about the 23d day of April, 1875, and that the place to which the spirits were removed if at all, was a railway car in the city of Milwaukee. Concealment, as I have stated, is not alleged in this count. The offense here charged is simply the act of removal.

In each of these counts, particular quantities of spirits are

alleged to have been removed—as in the first, 3500 proof gallons, in the second, 3000 proof gallons, and the third, 3500 proof gallons. Nevertheless, it is not necessary to prove that these precise quantities were so removed. So far as quantity is concerned, proof of any quantity removed, less or more than is alleged, upon which the tax had not been paid, is sufficient. You will bear in mind, that it is essential that it be proved that the spirits, if any, removed or concealed as alleged in the first and second counts, and removed as alleged in the third count, were spirits upon which the government tax had not been paid, that the places of removal and concealment were as alleged, and that the defendant, Jacob Nunnemacher, was a party to or aided in or abetted the commission of the acts charged.

Particular times of removal, and removal and concealment of spirits are alleged in these three counts. It is not however indispensable that the prosecution prove that these alleged transactions took place at the precise times stated. If it be shown that the removal of spirits alleged in any one of these counts or the concealment of spirits alleged in the 1st and 2d counts, were made at or about the time therein stated, this is sufficient. The time to be proved must be at, or about, or near the time stated, so that it may be plain that the proof is not of some other transaction than that alleged.

Evidence has been introduced tending to show removals of spirits from the distillery mentioned, to places other than the distillery warehouse, at periods considerably anterior and even several years prior to the times stated in either of these three counts in the indictment. Concerning this evidence, I have to say, that it was only permitted to be given in support of the fourth or conspiracy count in the indictment, and that evidence is not to be considered by you as at all bearing upon the first three counts or either of them. Evidence of removals of spirits in previous years would not support the allegations in either of those counts. To use it for such purpose, would be to accept proof of one offense to convict of a differ-

ent offense, and this could not be permitted. Conviction on either of the first three counts must be of the specific offense therein charged, and the evidence to establish such offense must be of the transaction or transactions alleged and occurring at or about the time stated.

I have said that to convict this defendant on either of these counts, it must be shown that he was a party to, or aided in, or abetted the commission of one or more of the acts charged. In this connection I may say that, although the first two counts allege both removal and concealment, if it be proved that the defendant removed, or aided in or abetted the removal from the distillery, of spirits upon which the tax had not been paid to the place or places stated, at or about the time or times alleged, conviction may be had upon the count under which removal may be proved, if at all, though concealment be not shown.

Now gentlemen, the three counts in question allege the commission of illegal acts. This defendant is charged with committing those acts. I may first state to you as a general proposition, that to establish this charge, there must be shown participation in or connection with the alleged removal or concealment of spirits on the part of the defendant, with intent to accomplish or forward the commission of the act. If he personally, with guilty knowledge or intent, did the act either for or by himself, or jointly with others, that of course ends the question. To instigate, encourage, incite, advise, procure or assist in the removal of spirits on which the tax has not been paid from the distillery to a place other than the distillery warehouse, with a design to accomplish, or promote, or facilitate such removal, is to aid in and abet the commission of the act. With these general propositions in mind, let us come to more particular statements. And what I now say, you will keep in mind when we come to consider the count for conspiracy, for the same general rules or principles apply under that count as under those we are now considering.

If this defendant was a party in interest in the business of

this distillery, or was a party participating in the profits of the business, and for himself or with others, directed, prescribed, ordered or set on foot the alleged removal or removals of spirits, then he may be convicted of such removal or removals, and that, too, though he may not have been personally present at the time.[1] If he was not such a party in interest, but personally and knowingly participated in the act or acts of alleged removal, then his relation to the transaction would be the same in point of responsibility as before. If he leased his distillery or furnished for hire or otherwise, teams and teamsters for the purpose or with the intent of providing the means or affording the opportunity to facilitate or accomplish the removal of spirits upon which the tax had not been paid, from this distillery to a place other than the distillery warehouse, or with knowledge that such instrumentalities were to be so used, and with such instrumentalities so furnished and employed, the alleged removals or either of them were made, then it could be said that he was influenced by an unlawful purpose, that he derived profit or advantage from the prosecution of that purpose, and he would be in that case a guilty participant in the act or acts. In other words, gentlemen, in such case, where a person with unlawful purpose or intent designs the commission of a criminal act and to carry out that purpose or effect the unlawful object, another is employed to do the act, that act becomes the act of the principal, and he, as well as the agent is criminally accountable. This is upon the principle that "he who commands or procures a crime to be done, if it is done, is guilty of the crime." So too, if these spirits were removed as alleged, and the defendant knew them to be spirits upon which the tax had not been paid, though he had no interest in the distilling business or in the spirits alleged to have been unlawfully removed, if he intentionally aided in or abetted the removal within the meaning of those terms, as I have before

1 *United States vs. Blaisdell*, 3 Benedict, 140.

stated it to you, then he offended within the meaning of the statute.

I have said that intentional participation in or connection with the alleged unlawful acts must be shown. From this it follows that proof of mere suspicion, or bare knowledge that the act is being done by others without such participation in it or connection with it, is not sufficient. If therefore the defendant leased this distillery and let his teamsters and teams, without knowledge that they were to be employed for the purpose of making or accomplishing unlawful removals of spirits, and without any purpose, intent or design of furnishing the means for such removals, but leased and let them so far as his intent was concerned, in good faith for the transaction of lawful business, and did not participate either as a party in interest, or otherwise in the alleged removals, or intentionally aid in or abet such removals, I do not think that, while such original letting of the distillery and teams and teamsters was continuing, mere subsequently acquired knowledge that the alleged unlawful transactions were in progress, would justify conviction under either of the first three counts in this indictment. Knowledge of the commission of unlawful acts may, however, be taken into consideration by the jury, in connection with whatever facts and circumstances may be proved, to aid in determining whether or not the defendant was a participant in or a party to the alleged unlawful acts, if such acts or either of them be shown.

Now it is claimed on the part of the government, that at the times stated in the first three counts of the indictment, this defendant was in fact a party in interest in the distilling business at the Kinnikinnic Distillery, although others were having the active management; that the connection of Guenther with the business as a manager was a mere cover or subterfuge adopted to facilitate the manufacture and removal of illicit spirits from the distillery, for the benefit of Jacob and Hermann Nunnemacher; that this defendant, whether directly a party in interest in the business or not, leased the

distillery and furnished teamsters and teams for the purpose of removing such spirits from the distillery to places other than the distillery warehouse, and had knowledge that they were to be and were so used, and that all the circumstances show his participation and intentional co-operation in the alleged unlawful acts charged in these counts of the indictment. This is the claim on the part of the prosecution.

On the contrary, it is claimed on the part of the defense, that he was not in any manner interested in the business of distilling; that he had leased the property, and that others operated the distillery and conducted, controlled and had the avails of the business, without any participation therein by him, except that he received, as he claims, rents for the use of the property, stipulated compensation for the employment of his teams and teamsters, and a portion of the slops of the distillery for his cattle and other stock; that he was engaged in carrying on his farm, dealing in cattle and hogs, and that his business was entirely disconnected from the manufacture of spirits, and that he had no interest therein. It is claimed further in his behalf, that there was no participation by the defendant, with guilty knowledge or intent in the removal or concealment of illicit highwines; that he knowingly rendered no aid, assistance or encouragement in the removal of such spirits, and that his attention to teams owned by him and assisting in the distillery business, was merely to see that they were not overworked and were properly used and cared for; and it is also claimed that the testimony is wholly inadequate and insufficient to establish either of these three counts as against this defendant.

The judge then recapitulated the points under the first three counts in the indictment upon which the jury must find, and proceeded:

Upon the fourth count in the indictment, the questions requiring your attention are these: 1. Was there such a conspiracy as is alleged, and if there was, were any or either of the overt acts charged in this count committed as alleged,

in execution of the conspiracy, or to carry into effect its object? 2. If such a conspiracy was formed and existed was the defendant connected with it, as one of the conspirators?

A conspiracy is formed when two or more persons agree together to do that which is unlawful—in other words, when they combine to accomplish, by their united action, a criminal or unlawful purpose; and the statutory offense is complete, when such agreement is made or such combination is entered into and one or more of the parties does any act to effect the object of such conspiracy. To illustrate, if two or more persons agree together that by fraudulent practices they will deprive or defraud the government of the tax required to be paid on distilled spirits, and one or more of these persons does any act to effect the object of such agreement, they are guilty of the offense of conspiracy.

"It is not necessary, to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly by words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design."[1]

A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the conspiracy, does not constitute the offense. There must be both the corrupt agreement or combination, and an act done by one or more of the parties to effect the illegal object or design agreed upon, to make the punishable offense under the statute. If the conspiracy is formed by all or some of the parties charged, and the act to effect the object of the conspiracy is done by only one of the parties, this constitutes a complete offense as to both or all of

1 *United States vs. Babcock*, 3 Central Law Journal, 144.

the members of the conspiracy, for in that case the act of one becomes the act of both or all. I say to you further, that such connection with or relation to a conspiracy as the law takes notice of and punishes, is not dependent upon personal, pecuniary interest in the result of the unlawful adventure. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way and from any motive work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy. In determining whether the person charged is one of the alleged conspirators, it is obviously proper and important for the jury to inquire whether any interest or motive pecuniary or of any other character, existed, for participation in the unlawful enterprise, and this may oftentimes materially aid in a determination of the question, as to whether the person accused was or was not one of the parties to the alleged conspiracy.

To establish the commission by the defendant of the offense here charged, you must be satisfied upon the testimony, that a conspiracy was formed to defraud the United States of the tax upon distilled spirits, distilled and produced at the distillery in question; that the defendant, Jacob Nunnemacher, was a party to that conspiracy, and that to effect the object of such conspiracy, one or more of the defendants named in the indictment did one or more of the overt acts therein alleged. The overt acts charged in this count are the removals of certain quantities of distilled spirits, upon which the government tax had not been paid, to a place and places other than the distillery warehouse provided by law. It is not essential that the precise quantity of spirits named in the count should be proven, nor is it necessary that the alleged conspiracy should be shown to have been formed at the precise time alleged. It is sufficient if it be shown that there was a quantity or were quantities of spirits distilled and produced at the distillery named, upon which the tax was unpaid,

that at about the time charged in the indictment, there was a conspiracy between any two or more of the persons who are alleged to have conspired together to defraud the government of the tax on such spirits, that the defendant on trial here, was connected with, or a party to such conspiracy, and that the unlawful combination was followed by one or more of the alleged acts done by one or more of the defendants, for the purpose of accomplishing its object. There must be at least two parties to a conspiracy, and the defendant, Jacob Nunnemacher, may be convicted under the allegations of the fourth count of this indictment, if it be established beyond reasonable doubt, that he either conspired with any of the defendants named in the count or with any person or persons unknown to the government and the jury, or with any of the defendants named, and any person or persons so unknown, to defraud the United States of the tax on the spirits mentioned.

To establish a conspiracy, it is not, as I have already said, necessary that there should be "an explicit or formal agreement for an unlawful scheme" between the parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. In such cases it is frequently impossible to produce such proof, because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in the terms of express stipulations. Hence it is competent to prove the alleged conspiracy by circumstances. The understanding, combination or agreement between the parties in the given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding there is no conspiracy. But as I have just said, circumstantial evidence may be resorted to, to show the agreement or conspiracy. The acts of parties, the nature of those acts, with the accompanying circumstances, the character of the transaction or series of transactions, as the evidence may disclose them, should be investigated and considered, and are some-

times the only sources from which to derive the evidence of an agreement which may be express or implied to do the act which the law condemns.

If you find the existence of the conspiracy as alleged, your inquiry upon this count will be narrowed to a single ultimate question of fact, namely: was the defendant one of the conspirators—a fellow conspirator with the officers and other persons named in the indictment. The government affirms it and must prove it by legal and satisfactory evidence in order to ask a verdict in its favor. * * * * * *

In this connection, I say to you further, that the identity of a conspiracy is not necessarily destroyed by the connection, at a subsequent period, of new or additional parties therewith. In other words, a conspiracy may be formed between certain persons, other persons may join it in its succeeding stages, and so its existence as one prolonged conspiracy may be continued. As the defendant is indicted for conspiracy with the persons named in the indictment, it is clear that the charge implies that the defendant knew there was such a conspiracy, and, with such knowledge, knowingly aided the conspirators in their unlawful scheme, and the alleged guilty knowledge and participation must be proved by the government.

Guilty connection with a conspiracy may be established by showing association by the person accused, with others in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may perform separate and distinct acts in forwarding that design. "If two persons pursue by their acts the same object, one performing part of an act, and the other another part of the same act, so as to complete it with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object."[1]

1 3 Archbold's Criminal Practice, 622.

Co-operation in some form must be shown, though that co-operation need not be prompted by personal pecuniary interest. There must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose, though that participation need not be active and may be subordinate. If parties in any manner work together to advance the unlawful scheme, having its promotion in view, and "actuated by the common purpose of accomplishing the unlawful end," they are conspirators. If a person, understanding the unlawful character of the transaction, encourages, advises, counsels, or in any manner, with a view to forwarding the enterprise or scheme, assists in its prosecution, he becomes a conspirator. * * * * *

Mere knowledge that a conspiracy has been formed or is in progress, unaccompanied by such acts or relation to it as show intentional connection with or participation in the conspiracy, is not sufficient to charge the person with the offense; though in such case, the fact of knowledge, when proved, may be considered in connection with the conduct of the person and all the circumstances, in determining whether or not he is a party to the conspiracy.

The Judge then reviewed the testimony at length and explained the character of evidence necessary to conviction.

Verdict, guilty under the conspiracy count, and not guilty as to the first three counts in the indictment.

Ex parte ROBINSON AND HENSHALL.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1876.

IN BANKRUPTCY.

1. EXEMPTIONS—STOCK IN TRADE.—Under the laws of Wisconsin, exemptions will not be allowed from the stock in trade, or from articles simply bought for exchange and which are not "used and kept for the purpose of carrying on the trade or business."

2. Decisions of the Supreme Court of Wisconsin as to exemptions commented upon.

Dewitt Davis, for assignee.

Howard & Thompson, for bankrupts.

DRUMMOND, J.—The question made in this case is whether under the law of this state the bankrupts, who were partners, are entitled to an exemption to the amount of $200 each from their "stock in trade" as jewelers, that having been their business before the decree in bankruptcy. It is a question that must be determined by the law of this state, the bankrupt law having remitted that matter in terms, with some exceptions, to the laws of the several states. The clause of the 9th part of the 32d section of the statute of Wisconsin in relation to the exemption of property from execution, is as follows: "The tools and implements, or stock in trade, of "any mechanic, miner or other person, used and kept for the "purpose of carrying on his trade or business not exceeding "$200 in value"—are to be exempt from execution; and the question is, whether this case is within the meaning of that law.

I think there may be some doubt whether the language used brings the case within the law.

What does it mean?

Does it mean the property that is purchased by the merchant for the purpose of being exchanged for money;—for instance, a piece of calico that the merchant buys simply to sell, or the silver ware, or plate, or watches, or diamonds, or other things which these jewelers purchased in order to exchange for money, or other valuable articles?

Are these the stock in trade used and kept for the purpose of carrying on the trade of jewelers, or of merchants? It seems to me it is a matter of doubt whether they are.

Now, if we take the tools of a mechanic, or the implements or stock in trade of a mechanic used and kept for the purpose of carrying on his trade, the language of the statute becomes intelligible. Any thing that he uses and keeps for that purpose to the amount of $200, is exempt, but the language of the statute, I think is significant of the kind of property that was intended to be exempt—tools and implements or stock in trade. They must not only be tools and implements or stock in trade, but they must be used and kept for the purpose of carrying on the trade or business. Now can it be said that any article which a merchant buys merely for the purpose of exchanging for money or other valuable property, or that a watch bought by a jeweler for the purpose of selling, is a part of the stock in trade used and kept for the purpose of carrying on his business.

He buys to exchange; he does not use and keep it for the purpose of carrying on his business, whereas the tools and implements, or any other article that a mechanic or miner uses and keeps for carrying on his business, is something different.

For example, take the case of a jeweler; while it may be said that the watches or silverware, or jewels which he buys simply to exchange for money, are not used and kept for the purpose of carrying on his business, yet other things about his establishment, as show cases and all the instruments con-

nected with the business, are used and kept for that purpose, just as the tools or implements of a mechanic are used and kept. I am not aware that this view of the case has been taken by the Supreme Court of this state, but it seems to me to be worth consideration, and there may be some doubt whether a proper construction of this language, when examined critically, can refer to articles purchased simply for exchange. They may be said not to be used and kept for the purpose of carrying on a man's business, but to constitute the business itself. But however this may be, I think it is clear that this case is not within any of the decisions which have been made by the Supreme Court of this state.

In the case of *Gilman vs. Williams*, 7 Wisconsin, 329, the Supreme Court of this state decided that when two persons, defendants, were partners, and a span of horses belonging to them as partners, had been levied upon, that they were exempt from execution within the terms of the statute. But this was an exemption claimed jointly, and the language of the statute was explicit that such property should be exempt from execution.

In *Wright vs. Pratt*, 31 Wisconsin, 99, which was a case where property owned by several persons as partners (a horse, buggy and harness) and in which the defendant in the execution had a one-third interest, it was decided by the Supreme Court that the property was not exempt from execution, for the reason that it was not in its nature severable, and the court distinguished that case from the case reported in the 7th Wisconsin, because there both the owners claimed the exemption, and said the doctrine of that case would not apply where it did not appear that all the owners of the property claimed the exemption.

In the case of *Newton vs. Howe*, 29 Wisconsin, 531, the Supreme Court held where there were parties who were tenants in common of the property, and it was of such a character that it was divisible, consisting of oats, wheat and hay, such articles as could be severed that the exemption could

be claimed by each co-tenant. It appearing in that case, that before the action was commenced against the officers who had taken the property, the parties had agreed upon a division of the property.

Now in this case, there was a stock of jewelry; and the bankrupts, it is to be presumed, kept the usual stock of jewelers.

If it appeared that this could be divided or was severable in the same manner as corn or wheat or articles of that kind, then it would be within the decision of the Supreme Court in the 29th Wisconsin, but there is no evidence that it is so; for instance, take two watches, if they are alike and precisely of the same value, one of these bankrupts might take one, and one the other; but suppose they were of different value, they are each jointly interested in both watches, and we cannot divide them.

So in relation to any two articles that they may have as jewelers, and which constitute their stock.

It would not be practicable, therefore, within the meaning of the decision of the Supreme Court of this state, to divide this property, even admitting that it was within the language of the statute, certainly not in the manner stated by the Supreme Court. A division of a quantity of hay, or of corn, proceeds upon the theory that it is in bulk and that it is alike; otherwise it could not be severable, and there would seem to be some difficulty in relation to hay, because in many cases hay is different in value, of different quality; and corn and wheat may not be of the same value or quality unless in bulk, mixed together and incapable of division into separate parcels so far as quality or value is concerned, and we have to assume that the whole bulk taken together is equally valuable throughout, one bushel the same as another bushel. So that I think the decision of the District Court is right, and the parties are not entitled to the exemption, if not in view of the suggested construction of the statute, on the ground that the Supreme Court of this state has put the case.

UNITED STATES vs. JACOB NUNNEMACHER *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1876.

1. DUPLICITY IN INDICTMENT.—Under the United States Statute, § 3296, an allegation of the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, and the concealment thereof, is equivalent to alleging the concealment of spirits which have been removed, etc., and on which the tax had not been paid, and an indictment drawn as above is not bad for duplicity.

2. EQUIVALENT WORDS.—In drawing an indictment it is not necessary that the exact words of the statute be used, if their precise equivalent is expressed, and the words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of."

3. CERTAINTY IN STATEMENT OF CONSPIRACY.—Certainty to a common intent is sufficient.

4. The allegation that the tax on the spirits "had not been paid" is sufficient without an allegation that it "was still due and owing."

5. The time when the spirits were distilled is not material.

6. Many cases cited and commented upon.

Motion to quash indictment.

It is alleged in the first count of the indictment that the defendants, on the 18th day of December, 1874, did remove and did aid and abet in the removal of 3500 proof gallons of distilled spirits on which the tax then due and owing to the United States, and required by law to be paid, had not been paid, from the distillery of Christian Guenther, where said distilled spirits had theretofore been distilled, to a place other than the distillery warehouse of the said Guenther, and did then and there conceal and aid in the concealment of said distilled spirits so removed, and on which the tax had not been paid.

The second count is like the first, except that the time of the alleged removal and concealment of spirits is stated in that

count to have been December 21st, 1874, and the quantity of spirits removed and concealed, to have been 3000 proof gallons.

J. C. McKinney and *L. S. Dixon*, for the United States.

Winfield Smith and *Jas. G. Jenkins*, for defendant Nunnemacher.

DYER, J.—The statute, section 3296, provides that "whenever any person removes, or aids or abets in the removal of "any distilled spirits on which the tax has not been paid, to "a place other than the distillery warehouse provided by law, "or conceals or aids in the concealment of any spirits so "removed, or removes or aids or abets in the removal of any "distilled spirits from any distillery warehouse, or other "warehouse for distilled spirits authorized by law, in any "manner other than is provided by law, or conceals or aids "in the concealment of any spirits so removed, he shall be "liable" to certain penalties.

The two counts mentioned are based upon the first general division of this section, and a motion is made to quash these counts on the ground of duplicity, it being claimed that the removal and concealment of spirits as mentioned in the statute and according to the terms of the statute are distinct and independent offenses which cannot be properly joined in one count.

It will be noticed that the section of the statute in question contains two general divisions—1st, the removal of distilled spirits to a place other than the distillery warehouse provided by law, or the concealment of spirits so removed—2d, the removal of distilled spirits from a distillery warehouse or other warehouse authorized by law, in any manner other than is provided by law, or the concealment of spirits so removed. I have had some doubt whether each of these divisions of the section was not intended, on its face, to express substantially one offense. But I am not willing to rest the question absolutely on such a construction.

It is a general rule that a count in an indictment which charges two distinct, independent offenses is bad, and should be quashed on motion.[1] A capital offense and a misdemeanor cannot be charged in the same count.[2] An indictment for forgery, stating two distinct offenses, as the forging of a mortgage and of a receipt indorsed thereon, and requiring different punishments, has been held bad.[3] A count charging horse stealing and ordinary larceny, for which offenses different punishments are imposed, cannot be sustained.[4] The general rule that the joinder of two or more distinct offenses in one count is not permitted, is elementary. The point of difficulty is what are two or more offenses within the rule.

There are certain exceptions to the rule in the case of particular offenses, as in burglary, adultery, &c., where the specific accusation includes an offense of an inferior degree,[5] but these are not material here.

Recognizing the rule on this subject as general and elementary, I find as the result of my examination of the numerous cases where the principle has been enforced, that the prevailing feature of these cases is, that the offenses charged in the same count, were either inherently repugnant, or so distinct that they could not be construed as different stages in one transaction, or involved different punishments. These I think are the main characteristics of the class of cases in which the rule is asserted.[6]

There is a class of cases, where, although offenses appear, by the use of the disjunctive in statutes declaring the offenses to be distinct and separate, it is nevertheless held that they are in effect but one offense and may be stated conjunctively,

1 1 Wharton Criminal Law, § 382.
2 *United States vs. Sharp*, 1 Peters C. C., 131.
3 1 Wharton Criminal Law, § 382.
4 *State vs. Nelson*, 8 New Hampshire, 163.
5 1 Wharton Criminal Law, § 383,-384.
6 *Greenlow vs. The State*, 4 Humphreys, 25-26; *Commonwealth vs. Symonds*, 2 Massachusetts, 161-2; *United States vs. Sharp*, 1 Peters C. C. 131; *State vs. Nelson*, 8 New Hampshire, 163; *Miller vs. State*, 5 Howard (Miss.), 250.

in one count. As where a person is charged with doing the thing which constitutes an offense, and causing it to be done, it being held that it is the same in law to cause a thing to be done as to do it.[1] For example, to charge a person with falsely making, forging and counterfeiting, and with causing and procuring to be falsely made, forged and counterfeited, is not objectionable, although each of the acts may be stated in the disjunctive in the statute, because the whole is in law one offense.[2] So a charge that the defendant administered and caused to be administered poison.[3] Of this class of cases is *Commonwealth vs. Eaton*, 15 Pickering, 273, where it was held that although a statute forbade a person to sell or offer for sale a lottery ticket, it was proper to charge that the defendant offered for sale and sold such a ticket, for the reason that a sale, *ex vi termini*, includes an offer to sell, and there is actually but one offense. So in *Commonwealth vs. Twitchell*, 4 Cushing, 74, where the statute imposed a penalty on any person who should set up, or promote an exhibition without license, it was held that setting up and promoting, constituted one offense and could be alleged as such, conjunctively in one count. In this class of cases, the offenses though disjunctively stated in the statutes creating them, constitute essentially one offense, and as argued by counsel for defendant, they do not reach the precise point we have here.

Let us now go a step further. Mr. Bishop says, vol. 1 Criminal Procedure, § 436, that if a statute declares "that "the doing of this or that, or the other thing, shall subject "the doer to a punishment which it specifies, plainly a man "may incur the penalty by doing any one of the three things. "And by doing the three things at different times and as "separate transactions he incurs the penalty three times, "and three times he may be punished. But suppose instead

1 Bishop's Criminal Procedure, § 434.

2 *Rasnick vs. Commonwealth*, 2 Virg. C., 356; *State vs. Hauseall*, 2 Rice's Digest, 346; *Mackey vs. State*, 3 Ohio State, 363; *State vs. Morton*, 1 Williams (Vt.), 310.

3 *Ben vs. State*, 22 Alabama, 9.

"of this, he does the three things at once and as one trans-
"action, the doctrine appears to be that he incurs the penalty
"but once, the same as though he had done only one of
"them. Whence we have the general proposition, that,
"subject perhaps to exceptions depending upon the peculiari-
"ties of cases and the particular language employed, if a
"statute forbids several things in the alternative, it thereby
"creates but one offense; and since the offense may be com-
"mitted in different ways, distinguished in the statute from
"one another by the disjunctive" 'or' "or committed by
"combining more than one or all the ways in one transaction,
"an indictment upon the statute may, in a single count,
"charge the defendant with all the acts, using the copulative
"'and' where the statute employs the disjunctive 'or'."

Following this principle it has been held that a person may be indicted for the battery of two or more persons in the same count.[1] "In felonies also, the indictment may charge "the defendant in the same count with felonious acts with "respect to several persons, as in robbery, with having "assaulted A and B, and stolen from A one shilling and from "B two shillings, if it was all one transaction."[2]

Wharton says, vol. 1 Criminal Law, § 390, "where a statute "* * * makes two or more distinct acts connected with "the same transaction, indictable, each one of which may be "considered as representing a stage in the same offense, it has "in many cases been ruled they may be coupled in one "count." "Setting up a gaming table, it has been said, may "be an entire offense; keeping a gaming table and inducing "others to bet upon it may also constitute a distinct offense; "for either, unconnected with the other, an indictment will "lie. Yet when both are perpetrated by the same person at "the same time, they constitute but one offense, for which "one count is sufficient, and for which but one penalty can "be inflicted."[3]

1 *Rex vs. Benfield*, 2 Bur., 980, 984.
2 1 Bishop's Criminal Procedure, § 437.
3 *Hinckle vs. Commonwealth*, 4 Dana, 518.

In the case of *State vs. Murphy*, 47 Missouri, 275, cited on the argument, it was held that "when a statute in one clause "forbids several things, or creates several offenses in the "alternative, which are not repugnant in their nature or "penalty, the clause is treated in pleading as though it "created but one offense, and they may be united conjunc- "tively in one count." In the case of *State vs. Fletcher*, 18 Missouri, 425, a distinction is taken on this question between misdemeanors and felonies. A statute declared that no person should set up or use any gambling device for the purpose of gaming, &c. The count in the indictment charged that the defendant set up and used and permitted games of chance to be played on the gambling device. A motion to quash for duplicity was sustained at the Circuit but overruled by the Supreme Court.

Our own Supreme Court in the case of *Byrne vs. The State*, 12 Wisconsin, 525, uses this language. "The rule is well "settled where a statute makes either of two or more distinct "acts, connected with the same general offense and subject to "the same measure and kind of punishment, indictable sep- "arately and as distinct crimes, when each shall have been "committed by different persons or at different times, they "may, when committed by the same person at the same time "be coupled in one count, as constituting altogether but one "offense. In such case the several acts are considered as so "many steps or stages in the same affair, and the offender "may be indicted as for one combined act in violation of law; "and proof of either of the acts mentioned in the statute and "set forth in the indictment will sustain a conviction."

Now it is not to be denied that a person may violate the statute in question by simply removing distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse, and without concealing the spirits. From the peculiar language of the statute, it would seem that to make a case of concealment there must have been a removal. Admit that the statute provides for two distinct

acts, indictable separately and as distinct crimes where each shall have been committed by different persons or at different times, the question remains whether a count is double when it charges the commission of both acts by the same person as one transaction and at the same time. The words of the statute are "removes or conceals." For both the acts the same measure and kind of punishment are imposed. Are those acts inherently repugnant to each other, especially in the light of the language of the statute, "conceals or aids in the concealment of any spirits so removed?" Are the acts of such a character, that they cannot under the allegations of the indictment be construed as different stages in one transaction? I can have no doubt upon the point. The counts in question charge, that on a certain day, the defendants removed a certain quantity of distilled spirits from a certain distillery to a place other than a distillery warehouse, and did then and there conceal the spirits so removed. Here are two things, which were done at different times, and as separate transactions involve two penalties, but, when done as one transaction, the penalty is but once incurred as for one offense. There is a combination of the acts of removing the spirits and concealing the same spirits so removed. It has been said that there may be removal without concealment, which is true. It has also been said that concealment does not involve removal. But the words of the statute are "conceals any spirits so removed," which imply a removal and then concealment. So that the charge in the indictment may be regarded, if it were necessary, as a charge of concealment. But in this view it is contended that the charge should be that the defendants concealed spirits which had been removed to a place other than the distillery warehouse, &c.; thus first affirmatively alleging the concealment. But in the reasonable use and connection of words, it would seem that an allegation of removal of spirits on which the tax had not been paid, to a place other than the distillery warehouse, and the concealment thereof is equivalent to alleging the concealment of

spirits which had been removed, etc., and on which the tax had not been paid. My conclusion is that the first and second counts are not bad for duplicity.

Another objection urged to these counts is, that it is not alleged that the tax on the spirits removed was due,and owing. The allegation is, that the defendants removed certain distilled spirits on which "the tax then and there due and owing to the United States and required by law to be paid, had not been paid." It is conceded that if the words "which was" had been inserted before the words "then and there" the allegation would have been complete. It is alleged affirmatively that the tax had not been paid, and I think the reasonable construction of the sentence is that the tax was due and owing. In the case of the *United States vs. Hesing et al*, in the Northern District of Illinois, one of the overt acts charged in the indictment to have been done to effect the object of a conspiracy, was the unlawful removal of certain spirits to a place other than a distillery warehouse, upon which spirits the tax imposed by law had not been paid, and this, it would seem from the opinion of Judge BLODGETT, was the whole allegation in relation to a tax due and unpaid. It was held that the indictment in all its parts, conformed to the requirements of the law in regard to what an indictment should contain.

I do not regard the objection well taken, that the time is not stated when the spirits mentioned in these counts were distilled. It is alleged that the tax on the spirits had not been paid; that they were removed from a distillery to a place other than a distillery warehouse. The time when the spirits were distilled is not material. The statute forbids the removal of any distilled spirits on which the tax has not been paid, to a place other than a distillery warehouse provided by law. It makes no allusion to the time or place when or where the spirits are distilled.

To the fourth count which is a count for conspiracy it is objected, that the overt acts charged are not alleged to have

been done to effect the object of the conspiracy set forth in the count. The allegation is that the defendants "in execu-"tion and pursuance of and according to said conspiracy, "combination and agreement had as aforesaid, did produce "and distill, &c." The words of the statute are "and one or more of the parties do any act to effect the object of the conspiracy," &c. It is insisted that the pleader should have employed the precise words of the statute, "to effect the object of the conspiracy" instead of the words "in execution and pursuance of and according to said conspiracy," etc. A ruling upon this point such as is insisted on by counsel for defendant, would require unnecessary exactness. While a particularity and clearness are required which will inform a defendant of the charge he has to meet, and the court of the offense claimed to have been committed, so that it may pronounce judgment if there be a conviction, the validity of indictments should not depend upon too great niceties of language. I do not understand that the exact words of the statute must be used, if their precise equivalent is expressed. The words "in execution and pursuance of" are equivalent in meaning to the words, "to effect the object of," as the respective definitions of the terms given by Webster, show. The case of *United States vs. Boyden*, 1 Lowell, 266, was cited by the attorney for the United States on this point. It was there held, that "the overt acts need not be laid as having been "done 'to effect the object' of the conspiracy, although these "are the words of the statute; it is enough to say that they "were done 'in pursuance' thereof, which are the usual "words in conspiracy;" and Judge LOWELL in his opinion refers to cases in New York, and a case in New Jersey, where the statutes require an act to be done to "effect the object" of the conspiracy and says indictments follow the more usual language, charging the acts as having been done "in pursuance of" the agreement.

Another, and the last objection to the fourth count is that the object of the alleged conspiracy is not stated with suffi-

cient certainty. It is alleged in substance that the defendants intending to defraud the United States of large sums of money in respect of the taxes upon distilled spirits, on the 18th of December, 1874, conspired together by producing and distilling large quantities of distilled spirits; and to ship, transport and remove said distilled spirits from the distillery of Christian Guenther, and out of this collection district without payment of the tax and taxes required by law to be paid on distilled spirits to the United States; unlawfully to defraud the United States of the tax on said spirits; to cheat and defraud the said United States of divers large sums of money in respect of the taxes upon distilled spirits; and to commit divers offenses against the said United States and against the internal revenue laws thereof. Then followed the overt acts which relate solely to the production, distillation and removal without payment of the tax required to be paid by law, of certain quantities of distilled spirits at certain times. The objection is urged that the language of the count "to commit divers offenses against the said United States and against the internal revenue laws thereof," is too general, neither the time, place nor particular character of these offenses being stated. If this were the sole allegation in relation to the object of the conspiracy, clearly the count would be bad. For to simply allege the intent or object of a conspiracy to be to commit divers offenses, without specifying any particular offense is repugnant to the elementary principles of criminal pleading. But here it is stated as an object of the alleged conspiracy, that the defendants conspired to defraud the United States of the tax on the spirits before mentioned, and of large sums of money in respect of the taxes upon distilled spirits. Here are specific, particular objects alleged. Does the further statement "and to commit divers offenses," etc., vitiate the count?

"The general rule is, that the charge must be laid in the indictment, so as to bring the case within the description of the offense as given in the statute, alleging distinctively all

the essential requisites that constitute it."[1] "All matters necessary to constitute the offense must be pleaded."[2] An indictment must set forth the particular facts and circumstances constituting the offense charged.[3] These are elementary principles. The allegations of the count wherein are set forth the particular purpose or object of the alleged conspiracy, namely, to defraud the United States of the tax on the spirits described, and to cheat and defraud the United States of divers large sums of money in respect of the taxes upon distilled spirits are beyond question sufficient. This, with the alleged overt acts following the conspiracy clause, points out with sufficient clearness the offense charged, so that the defendants can be advised of the nature of the offense, and prepare for trial. In *Stoughton & Hudson vs. State*, 2 Ohio State, 562, Judge THURMAN holds the true rule, "that unrea-"sonable strictness ought not to be required, and where an "indictment clearly charges a crime and fairly advises the "defendant what act of his is the subject of complaint, the "principal object of pleading is attained. The highest degree "of certainty is not required. Certainty to a common intent "is sufficient." The statement of one of the objects of the conspiracy as being "to cheat and defraud the United States of divers large sums of money," is sanctioned by the precedents and by the highest authority.[4] We have then a count containing apt allegations covering a statutory offense, and then an added allegation of a further purpose of the alleged conspiracy, namely, "to commit divers offenses" without enumerating them. Does the whole count fall because of the insufficiency of the last mentioned averment?

In the case of *United States vs. Clark*, 1 Gallison, 497, cited by defendant's counsel, the indictment charged one offense, perjury: and the entire charge failed because the indictment

1 *The United States vs. Staats*, 8 Howard, 44.

2 *United States vs. Prescott*, 2 Bissell, 326.

3 *Allen vs. State*, 5 Wisconsin, 335; *Fink vs. Milwaukee*, 17 Wisconsin, 26; *Commonwealth vs. Hunt*, 4 Metcalf, 125.

4 Wharton's Precedents, 638.

did not throughout allege the offense to have been committed in any court of the United States, nor in any deposition taken pursuant to its laws. There was a failure to allege any offense whatever within the purview of any statute.

In *Rex vs. Fowle et al.*, 4 Carrington and Payne, 592, the indictment simply charged the defendants with conspiring "to cheat and defraud the just and lawful creditors of W. F." That was all. There was no further statement of the conspiracy nor of any overt act, and the case is radically dissimilar to that at bar.

Hartman vs. Commonwealth, 5 Pennsylvania State, 65, would be an authority supporting strongly the position of defendant's counsel, if no statutory offense, as the object of the conspiracy, were particularly set forth in the indictment.

The case of *United States vs. Bettilini*, 15 Internal Revenue Record, 32, also cited, is a strong authority to the point that an indictment should embrace "a certain description of the "crime of which the defendant is accused, and a statement of "the facts by which it is constituted;" and upon this elementary principle there can be no controversy. As I have said, if this indictment simply charged a conspiracy to commit divers offenses against the United States and the internal revenue laws thereof, it would be unquestionably bad. No evidence can be permitted to be given under that allegation in this count. Why may it not be rejected as surplusage, when precise and specific offenses are previously alleged as among the purposes of the supposed conspiracy.

Mr. Bishop, vol. 1, Criminal Procedure, § 497, says that "if an indictment is founded on a statute, and it contains "allegations covering all the terms of the statute and making "a complete offense, and then if it adds something by way of "making the offense appear more enormous, the latter matter "may be disregarded as mere surplusage." Again he says, § 480, "suppose there is matter in the indictment defectively "alleged; yet if rejecting all this, enough remains to meet "the requirements of the law, the indictment is good; the

"surplusage passes for naught." The case cited by counsel for the government, of *Commonwealth vs. Bolkom*, 3 Pickering, 281, upon this question, seems to be in point. In that case, it was held that in an indictment charging an innholder with suffering persons "to play at cards and other unlawful "games, the words 'unlawful games,' might be rejected as "surplusage." In the case of *Commonwealth vs. Arnold*, 4 Pickering, 251, where an indictment charged the defendant with permitting persons to play "at the game of cards," it was held that the words "the game" might be rejected. Of course where the rejection of an allegation would vitally impair the structure of an indictment, or render it meaningless, such allegation cannot be disregarded as surplusage. So where the averment is essentially descriptive of the sole offense charged, as in the case of *United States vs. Thomas*, 2 Abbott, 114.

The motion to quash will be denied.

CHARLES BECKWITH vs. CITY OF RACINE *et al.*

LATHAM CORNELL vs. SAME.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1876.

IN EQUITY.

1. LEGISLATIVE CONTROL OVER MUNICIPAL CORPORATIONS.—Counties and towns are, as to their corporate existence, completely within the control of the Legislature. They may be changed, altered, enlarged, diminished or extinguished, by the mere act of the Legislature.

2. When a town is thus obliterated, an action at law cannot be maintained against it, for it cannot be served by process through its officers, for although the officers of a municipal corporation hold until their successors are elected and qualified, still where no successors could be elected, they cease to hold.

3. A contract entered into previously, is not destroyed and annulled by the obliteration of the town, for the power of taxation still remains. It is only transferred to other corporations.

4. EQUITABLE ENFORCEMENT OF CONTRACT. When a contract cannot be enforced at law, if there is any fund to which the creditor has a right to resort for the enforcement or payment of that contract, it will be followed by a court of equity.

5. Where a municipal corporation is legislated out of existence, and its territory assigned to other municipal corporations, the latter must pay the existing debt of the former in the ratio of the amount of territory each obtained.

Fuller & Winslow, for complainants.

Fish & Lee, and *Jenkins, Elliot & Winkler*, for defendants.

Before DRUMMOND and DYER, J.J. Opinion of court on demurrer.

DRUMMOND, J.—On the 2nd of April, 1853, the legislature of this state passed an act to authorize certain towns to aid in the construction of the Racine, Janesville and Mississippi Railroad.

By that act, the town of Racine was authorized to subscribe $50,000 to this railroad. The third section of the act declares, "that the board of Supervisors of the towns whenever the same shall become necessary, shall annually levy a tax upon the taxable property of the town, sufficient to pay the interest upon the bonds, which may be issued as a part of the subscription, after deducting the dividends due to the towns on the shares of the stock."

The stock was subscribed to this amount by the town of Racine, and bonds were issued, and those bonds, according to the allegations in the bill, have come into the hands of the respective plaintiffs for value; they have become, therefore, *bona fide* holders.

By various enactments of the legislature, subsequent to 1853, which it is not necessary to follow in detail, the town of Racine, which was authorized to subscribe this amount of stock to the railroad, was obliterated in name, and the territory which in 1853 was within the limits of the town of Racine, is now included, or was at the time these bills were filed, in the towns of Mount Pleasant and Caledonia, and the city of Racine. And the question is, what is the effect upon the rights of the plaintiff of this legislation in thus obliterating the town of Racine and bringing within the limits of the towns of Mount Pleasant and Caledonia and the city of Racine, the territory that was in 1853 comprehended within the town of Racine. In relation to those bonds, Has the obligation of the contract thus made by the town of Racine been destroyed or even impaired? We think that it has not.

It is not claimed on the part of the defense that there is not a liability, or may not be, but it is insisted that whatever liability exists, is at law; and these being bills in equity, and there being a plain and adequate remedy at law, according to well settled principles, the bills in equity cannot be sustained. If the town of Racine were in existence, and could be sued, howmuchsoever its territorial limits might have been modified, changed or curtailed by acts of the

original parties since 1853, then it might be said that there would be a complete remedy at law, because under such circumstances the town of Racine supposed to be existing as a corporation, would be subject to suit; process could be served upon it, and it could be brought into court. But can that be done now? It is said that inasmuch as the Constitution of the United States protects all contracts and prevents any legislation of a state which tends to impair them, for the purpose of enforcing them a corporation must be presumed still to exist, and subject to process; and so an action can be brought against it. If that is so, these bills cannot be maintained; but is that so in point of law and fact? We think it is not.

Counties and towns, are, as to their corporate existence, completely within the control of the legislature. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature. They are absolutely within the legislative control, and there can be no question of the power of the legislature to change or alter the town of Racine, and so to speak, annihilate it as a town or a corporation; and the question is when this is done, is there anybody, any entity *in esse* that can be sued.

One of the attributes of a corporation is that it can sue and be sued. If a corporation does not exist, How can it sue? It will be admitted that it cannot sue. How can it be sued? Manifestly upon no other ground than that a contract has not been impaired, and there must be a way of enforcing it, and the corporation must still exist for the purpose of suit and enforcement of the contract.

Obviously that cannot be so, unless there is some law in existence which creates and continues corporate functions for that purpose; which clothes some persons naturally or artificially with a capacity to be served with process, and brought into court, and to appear by counsel. It is said that by operation of law and in conformity with express enactments, the officers of corporations, of counties and towns con-

tinue in existence until their successors are elected and qualified; and inasmuch as in this case, when this town was obliterated by the fiat of the legislature and ceased to exist as a town, there were officers of the corporation in existence; that they have continued to exist as such officers up to the present time; and would as long as there was in existence a contract which could be enforced against a town.

Now, it is, I believe, about 14 years since there was a town of Racine. It is perfectly clear to me that the act of the legislature which is referred to, does not contemplate such a case as this when it declares that the officers of a municipal corporation shall continue in existence until their successors are elected and qualified.

In this case there could be no successors elected or qualified, because the capacity to elect had ceased to exist. And it certainly can only refer to cases where that could be done. Therefore, it seems to me that the conclusion is irresistible, that in this case, these officers did not continue to hold an office to which successors can be elected or qualified.

The act of the legislature contemplates, and it necessarily implies, the continued existence of the corporation; therefore there is no person upon whom service can be had in an action at law, because there is no corporation in existence for the purpose of maintaining a suit at law.

Then the next point is, whether the contract has been destroyed because the legislature has destroyed the corporation. We think it has not. The act of 1853 declares that the interest upon these bonds should be paid in a particular way by the imposition of a tax upon the property at that time within the limits of the town of Racine. That was the fund which was provided for the payment of these bonds, or at any rate of the interest on the bonds; therefore, the creditor had a right to look to the taxing power of the town as his means of payment.

Now, the power of taxation which then existed, and which was recognized in the act of 1853 as the means of enforcing

the payment of the debt which might be created is not gone, it has only been transferred to different municipal corporations. Whatever may be said of the personal property, the real, fixed property which could then be resorted to to pay this debt is still there, and the power of taxation still exists.

It is a well recognized principle in equity, as a contract cannot be impaired, that where there is any fund to which the creditor has a right to resort for the enforcement or payment of the contract, it will be followed by a court of equity. It would be a reproach to the jurisprudence of this country, where the principle in the fundamental law of this union is that no state can pass a law impairing the obligation of a contract, if it were allowed to be impaired or destroyed, simply by the change of boundaries of a town, or by striking out the name of one town and putting in the name of another; by the town of Racine ceasing to exist under legislative enactments, and Mount Pleasant and Caledonia and the city of Racine being substituted in its place.

Then this being so, that the contract still exists, and that a court of equity will enforce it, the question is, whether this is in the predicament of some of the cases that have been referred to, and particularly of the case decided by the Supreme Court of the United States, where it is said that there are many contracts which cannot be enforced, that there are many debts existing which can never be paid, and therefore, there may be the right without a remedy. I do not think that this case comes within that category. If there were nothing to which the creditor had the right to resort to enforce his contract, it might be so, like the case of the individual who is stripped completely of all means to pay a debt. There is a judgment, or decree, but the fault is not then in the law; it is because there is nothing which the party has to meet the decree, or satisfy it.

It may be conceded that there are some difficulties connected with the details of such a case as this, and a court of equity

possibly in carrying out the objects sought in whole or in part by these bills, may meet with some obstacles in enforcing the obligations of the town of Racine; but it is to be hoped they will be met and overcome. If that cannot be done, it would be a very hard case for the creditors of our municipal towns and corporations, and particularly in this state, because all that it would be necessary to do would be simply for the legislature to pass a law changing all those municipal corporations, making others in their stead and making new boundaries, and in that way some municipalities could get rid of debts which they are now trying to avoid in ways not much more creditable. I do not think that that can be done.

The counsel for the defendant insists that the remedy can only be pursued after a judgment has been obtained at law. His sense of justice and equity revolts at the idea of there being no remedy; but he says it must first be sought in an action at law. I have already stated the reasons why I think that cannot be done.

The principles declared in the case of *Curran vs. The State of Arkansas*, 15 Howard, 304, I think substantially dispose of most of the material questions in this case. It is true in that case the bank charter was not absolutely repealed, and it was undoubtedly competent to enforce the rights of creditors against a fund which the state had undertaken to control in derogation of their rights. But while that case declares that it is competent for the legislature to dissolve a corporation, it asserts that the dissolution of the corporation does not impair the obligation of the contract, and that a court of equity can enforce the contract by any of the various means within its power. There is one remark made by the court which, although it does not absolutely decide this question, still it is clear it was in the mind of the court. The court says, that whatever technical difficulties exist in maintaining the action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in the creditor following the property of

the corporation into the hands of any one not a *bona fide* holder.

It is true that was a bank, but as I have already stated, the control of the legislature over municipal corporations is absolute; and the fact that that was a bank, and this is a town can certainly make no difference. All the technical difficulties in the way of the maintainance of a suit at law, which are referred to by the court in that case, seem to be insurmountable.

In fact, I think that it would be found that the counsel for the defense, if these parties had been sued at law, would have objected that no suit at law could be maintained against the town of Racine.

I have said that the power of taxation has not been annihilated. It still exists; it has only been transferred, and as at present advised, I should be inclined to think that it would be competent for the court to apportion this indebtedness among these various defendants in such a way as to make each one of them answerable in proportion to the fund that has come within its control for the payment of this debt. I do not say that that will ultimately be the view which the court may take of it; but as at present advised, I feel inclined so to hold. At any rate, it is clear to my mind that there must be some way by which those parties who have control of this fund, which the legislature set apart for the payment of this debt, can be made answerable for it.

Therefore, the demurrer will be overruled. The defendants may have reasonable time to answer.

On the final hearing of the cause, the following was the opinion of the court:

DRUMMOND, J.—When these cases were submitted on the demurrer, the court stated its general conclusions on the law, and I see no reason to doubt the correctness of the conclusions then reached. The two cases are substantially alike. They have been presented to a master, who has taken proof, and

they have come up now for final hearing, but whether or not the report of the master may be of such a character as to entitle the parties to a decree may be questionable, but there probably can be an arrangement made between counsel by which a decree can be prepared after hearing the opinion of the court. I think the plaintiffs are entitled to a decree.

When the bonds were issued on the 6th of December, 1853, as well as when the act under which they were issued was passed, April 2d of the same year, the town of Racine consisted of all of fractional towns 3 and 4 of range 23, except what was within the limits of the city of Racine, and comprehended not far from thirty sections of land. It was bounded on the west by the towns of Caledonia and of Mount Pleasant, and on the east by Lake Michigan. In 1856 the boundaries of Mount Pleasant were extended to the lake, so as to include nearly one half of the town of Racine, thus cutting off the whole of the south part of the town, and including it within the limits of the town of Mount Pleasant. In 1857 the boundaries of the town were again changed. Caledonia and Mount Pleasant were both extended to the lake, and Racine was left lying between those towns, Caledonia on the north, and Mount Pleasant on the south, the boundaries of Racine being extended from the lake to the western boundary of range 22, being four sections in width north and south, and thus constituted, Racine comprehended, on the east about twelve sections, which it had in 1853, and took in on the west what was then a part of Mount Pleasant, and of Caledonia, being twelve sections from each town. With these boundaries the name of Racine was changed to Orwell. In 1860, the town of Orwell was vacated and all of its territory attached to the towns of Caledonia and Mount Pleasant, thus Racine, or Orwell, ceased to exist as an organized town. In 1871, there was added to the city of Racine a small part, namely, two or three sections of what was then Mount Pleasant, and of what was a part of that town and of Racine or Orwell in 1857, and a part of Mount

Pleasant and of Racine in 1856, and a part of Racine in 1853. The various changes are marked on the plans of the town, which are given by the master in his report of the testimony. This was the condition of the towns and the city of Racine when the bill was filed, and the question is, What are the rights of the parties?

I have already said that it was not competent for the legislature to impair the obligation of the contract made by the town of Racine, as it existed in 1853; when the subscription was made to the railroad stock, and the bonds issued. There was a contract between the parties which could not be affected by any subsequent legislation. When the town, by legislation, was brought within much narrower limits, What was the status of the case when this change was made? I think, according to well settled principles, it must be understood, no legislation being had in relation to the debts of the town, and Racine being left with these curtailed limits, the debt of Racine followed the town. The newly constructed Mount Pleasant, although it had taken in a portion of the old town of Racine, was not required to pay its debt, or any portion of it; it took, therefore, the territory from Racine, without the liability arising from its indebtedness, and the debt remained fastened upon the town of Racine, as it was then bounded. If that is so, What was the condition of affairs when these boundaries were changed, and Caledonia and Mount Pleasant were both extended to the lake, and Racine was left a strip of land four sections in width, from the lake to the western boundary of range 22? It had thus taken in a portion of the old town of Racine, and also a portion of Caledonia and Mount Pleasant, and the north portion of the town of Racine was cut off, and placed within the territorial limits of Caledonia. There had yet been no legislation in relation to the indebtedness of the town of Racine, and I think the indebtedness was cast upon the town of Racine as thus newly constructed by the act of the legislature. A portion of the old territory was taken within the limits of the town; it had

taken in also a portion of both Caledonia and Mount Pleasant. It thus had additional territory which it had not in 1853, from which it might be enabled to pay the debts it had then created, but the law of the case is, as I understand, the territorial limits of a town being absolutely within the control of the legislature, it was competent for it to change or alter in any respect, to diminish or add to, the territorial limits of the town, and nothing being said about any indebtedness the debt followed the town as thus newly constructed, whether diminished or enlarged. When the town of Racine had thus been created by the act of the legislature, and the name of the town changed to Orwell, that change of name could not affect the rights of the parties. The obligations of the town still existed, and when Caledonia, Racine or Orwell and Mount Pleasant were created—Caledonia on the north, Mount Pleasant on the south, Racine in the middle, extending from the western boundary of range 22 to the lake—then it was with the indebtedness of Racine, as created in 1853, or of Orwell, as it was subsequently called. This, then, was the position of the case when some important legislation took place upon the subject, and, as it has been stated, in 1860, Orwell ceased to be an organization, and its whole territory was annexed part to Caledonia, and part to Mount Pleasant; then, and afterwards, there ceased to be a corporation municipal which was liable to the plaintiff for the former indebtedness of Racine; and there existed only the corporations of Caledonia and Mount Pleasant. According to the view I take of the case, this circumstance did not impair or destroy the indebtedness of Racine; it was not competent, as I have stated before, for the legislature thus to put an end to the indebtedness. If that had been attempted, it certainly would have been unconstitutional legislation; so that I think Caledonia and Mount Pleasant having taken, as corporations, the territorial limits of what was formerly Racine, or Orwell, must equitably be held to be responsible for its debt. Having taken all the means by which the town of Racine could pay

its indebtedness, it must be held that they stand in the place of Racine, and liable for the same. And we cannot take one and leave out the other, because by the same act of legislation the territory of Racine was attached part to one, and part to the other, operating therefore at the same time and upon both towns, and as the debt was against the town of Orwell at the last moment that it ceased to exist as a town, it was then transferred equitably to Caledonia, and to Mount Pleasant. Then in 1871 there was an addition made to the city of Racine. Between two and three sections of land were added to the city and taken from Mount Pleasant.

The act which thus added to the limits of Racine, declared that it should be liable, (there seems now a new element in the legislation, and that there must be some provision made for the debt of the town of Racine,) to pay the debts of the town of Racine in proportion to the territory which it took, so here we have an act of legislation which makes it incumbent upon the city of Racine to pay its proportion of the indebtedness. If these principles are correct, the city of Racine being obliged by the express term of the law to pay a portion of the indebtedness, and the towns of Caledonia and Mount Pleasant being also obliged, from the nature of the case, the only question is: How is the division to be made between these respective corporations? and it seems to me that it can only be made upon the proportion of territory which each of the towns took from Orwell.

Now the act of 1853 in authorizing the indebtedness of the town of Racine, declared that provision should be made by a tax upon the property of the town to pay the interest on the indebtedness. It did not say in terms, real estate, but upon the property; and it might be presumed to include both personal and real property. But it is obvious, I think, that it is impracticable, in the nature of things, for the Court to determine the amount of personal property that may have been taken off from the town of Orwell by Caledonia, or by Mount Pleasant, and it seems to me that the only satisfactory method

of determining the part of each is that the debt shall be apportioned according to the territory that each took from the town of Orwell.

A case has been recently decided by the Supreme Court of the United States; *Laramie County vs. Albany County*, 92 United States Reports, 307, the principle of which is, as it has been stated by the court, that when an indebtedness is created by a municipal corporation, and there are created out of that corporation new corporations, such as counties or towns, the debt of the old corporation follows it within the new territorial limits, and the new municipal corporations are not bound to pay any portion of the indebtedness unless the act of division so prescribes. In that decision this language is quoted and approved by the Supreme Court, in referring to the case of *Bristol vs. New Chester*, 3 New Hampshire, 534, as to the power to divide towns—"The power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided, is incident to the power to divide the territory. * * * Such a decision must be founded upon the circumstances of each particular case."

Now that principle, it seems to me, applies to the peculiar circumstances of this case, and that the division must be made as I have suggested, namely: Caledonia must pay in proportion to the territory that it has taken from Orwell, and so must Mount Pleasant, and the city of Racine in proportion to the territory that it has taken, as prescribed by the act of the legislature.

In re WILLIAM RAGSDALE.

DISTRICT COURT.—DISTRICT OF INDIANA.—APRIL, 1876.

IN BANKRUPTCY.

1. BOOKS OF ACCOUNT.—A bankrupt who is engaged in farming and trading live stock is not a tradesman within the meaning of Sec. 5110 of the United States Revised Statutes, and a "failure to keep proper books of account" will not be a valid objection to his discharge.

Henry C. Duncan *et al.*, who are creditors of the bankrupt, filed specifications of the grounds of their objection to his discharge, alleging, 1. Failure and refusal of bankrupt to surrender all his property. 2. Failure to keep proper books of account. 3. Fraudulently procuring assent of creditor to discharge. These allegations being denied by the bankrupt, and issue joined thereon, the matters in controversy were referred by the Court to Noble C. Butler, Esq., one of the Registers in Bankruptcy thereof, for report and finding; who, after hearing the evidence, reported the testimony and the following opinion.

Howk & Tuley and *Riley & Iseminger*, for bankrupts.

Wilson & Dana, for opposing creditors.

The proof does not sustain either the first or third specifications filed by the creditors. As to the second specification, it is shown that the bankrupt was engaged in farming and trading. His trading consisted in buying and selling live stock. The character of the "books of account" kept by him is revealed by his answers to questions 73, 79, 80, 81, 82, 83, and a statement by him just at the close of his answer to 132, upon an examination under Section 5086, United States

Revised Statutes, the record of which is introduced as part of the evidence herein. They were evidently very imperfect. He did not keep an account of all his sales, and he thinks his books would "show about two-thirds or three-quarters of his business" only. They could hardly be considered "proper books of account" within the meaning of the law,[1] which while it does not enjoin any particular form of book-keeping, certainly requires that it should exhibit a full and accurate account of one's business transactions.

But the law imposes this duty upon merchants and tradesmen. It is not claimed that the bankrupt is a merchant (who is defined to be, in one sense, a trader, by Webster, and by Burrill and Bouvier in their Law Dictionaries), but that he is a tradesman. It will be observed that this is not the same expression used in section 5021, which makes the stoppage of payment of commercial paper by a "trader" an act of bankruptcy. According to the decision under this section, and the definition of the term by the English courts, the occupation of the bankrupt may be designated as that of a "trader." And primarily these words "trader" and "tradesman" mean one who trades, and they have been treated by the courts in many instances as synonymous. But in their general application and usage, I think, they describe different vocations. By "tradesman" is usually meant a shopkeeper. Such is the definition given the word in Burrill's Law Dictionary. It is used in this sense by Adam Smith. He says (Wealth of Nations), "a tradesman in London is obliged to hire a whole house in that part of the town where his customers live. His shop is on the ground floor," etc., etc. Dr. Johnson gives it the same meaning, and quotes Prior and Goldsmith as authorities. It was held by Bell, J., in 4 Pennsylvania State Reports, 472, to mean, in the United States, a mechanic or artificer whose livelihood depends on the labor of his hands; or, in a more enlarged sense, any person engaged in mechani-

1 United States Revised Statute, § 5110.

cal pursuits or employments; but the English definition seems to be more accurate even in this country.

The bankrupt, however, does not come within either of these descriptions of a tradesman; and, for this reason, I think that section 5110 does not apply to him. I find, therefore, on the whole that the specifications ought to be dismissed.

Respectfully submitted,

NOBLE C. BUTLER,
Register in Bankruptcy.

GRESHAM, J.—The ruling of Mr. Register Butler is approved, and the clerk will make the proper entry.

ALBERT G. HYDE *et al.* vs. THE FIRST NATIONAL BANK OF LACON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL, 1876.

1. THE LIABILITY OF A BANK TO WHOM COMMERCIAL PAPER IS SENT FOR COLLECTION.—A second bank receiving the paper from the first and collecting the money on it, is not liable to the owner of the paper.

2. On the deposit of a note with a bank for collection, a contract is implied between the owner and the bank, but this implied contract does not follow the note into the hands of the bank's collecting agents.

3. The owner has no remedy against an agent of the collector.

Action was brought to recover a certain sum of money, charged to have been collected from John Hutchins, by defendant for plaintiffs. Plea, general issue. The case was tried by the Court by stipulation.

Tenneys, Flower & Abercrombie, for plaintiffs.

Dent & Black, for defendant.

HOPKINS, J.—The evidence showed that John Hutchins, of Lacon, in this state, gave his note to the plaintiffs, residents of New York City, for $407.63, on the 15th day of September, 1874, payable in four months, at the First National Bank of Lacon, the defendant. The plaintiffs indorsed the note to the order of A. Hest, Esq., cashier, for collection for their own account. Hest then indorsed it to the defendant for collection for Cook County National Bank. Mr. Hest was the cashier of the Cook County National Bank, and sent the note in a letter to the defendant, on the 11th day of January, 1875, with instructions "to collect and credit." The defendants kept an account with the Cook County Bank, and then had a considerable sum in that bank. The note was paid to defendant on the 18th of January, 1875, and credited to the Cook County Bank, as other collections in the usual course of business. The defendant remitted, on that day, to the Cook County Bank, more money than this collection amounted to, and had at that time a large balance due it from that bank.

The Cook County Bank failed on the 19th of January, but the defendants had no knowledge of its failure or embarrassment until about noon on the 19th.

The testimony also showed that the custom between that bank and defendant, and also between the other Chicago banks and their country correspondents, was to make collections of notes sent there for that purpose, and credit the proceeds to the bank transmitting them, that no account was kept with any other person of such paper sent for collection; that this custom prevailed as well when the paper was indorsed to the bank sending for collection on account of their own, as when indorsed generally; and that accounts of all such transactions, in all cases, were kept in the same way.

These are the substantial facts, and the law applicable as now settled by the Supreme Court of the United States, may

be stated as follows: that when an owner of commercial paper sends it to, and it is accepted by a bank for collection, whether payable at the place where such bank is located, or elsewhere, in the absence of any contract to the contrary, there is an implied agreement with such bank arising from the acceptance of the employment, that it will perform all the acts necessary for the collection, and if not paid, of charging the parties thereto. It is not regarded as the appointment of the bank as the attorney of the owner of the paper, authorized to select other agents suitable and competent for the purpose of collecting the note, but on the contrary "its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated, are its agents and not the agents of the owner of the note;" that its duty is not discharged when it selects responsible agents to perform the duty entrusted to it; that the owner of the paper is not to look to the responsibility of the agents entrusted by the bank with his collections; that the bank to which he commits the paper is alone answerable to him for the performance of all acts necessary to secure his rights, including the payment of the money when collected;[1] and that the liability to pay over attaches as soon as the money is paid, either to it, or to a sub-agent selected by said bank to collect for it.

This being so, it follows that the owner is to look to his immediate contractor, and has no remedy against the under contractor or agent employed by the bank; that such agents or contractors have no privity of contract with the owner and are not liable to him, but are only liable to the party immediately employing them; in short, that the sub-agent employed by the bank owes no duty to the party who deposited the paper for collection with his principal, and hence is not responsible to him for any damages. This, I understand to be the effect and meaning of the late decision of the Supreme

1 *Ayrault vs. Pacific Bank*, 47 New York, 570.

Court of the United States in the case of *Hoover, assignee, vs. Wiese*, 8 Chicago Legal News, 193.

Although prior to that decision I had considered that the weight of authority was in favor of the owner's having a right of action against the party who actually collected the money upon the note, although a secondary agent, unless he had paid it before notice of the owner's claim, or had made advancement upon the paper to the party from whom he received it in such a way as to enable him to hold the proceeds on the ground that he was a *bona fide* holder of the paper for value.

But this decision, by declaring that a secondary agent is not liable at all to the owner, completely overthrows the theory upon which such supposed liability was based, and excludes the consideration of the question of the rights of such agent, as against his immediate principal, and renders immaterial the question as to whether he knew the bank employing him was the owner of the paper or not, for not being answerable to the owner in any case, without some arrangement changing the implied contract arising from the said employment to collect, it is unimportant to the owner to inquire what right such agent may have against his employers.

In the case of *McBride vs. The Farmers Bank*, 26 New York, 450, a recovery was had against the secondary agent, which, at first, seems to be in conflict with the earlier New York cases cited, and followed in the opinion of the United States Supreme Court above mentioned. But on examining that case carefully, it appears that the bank gave an order to the owner of the paper, or its agent, for the notes, before the payment of the notes, and that he demanded them of the agent before payment, and that the failure of the bank was before payment, which distinguishes it from the case cited, and from this also; for here the money was collected by the defendant before the Cook County Bank failed, and was by this defendant passed to the credit of that bank the day before the failure, so that the Cook County Bank's liability to the plaintiff for the money attached before its failure, which

brings the case, in my judgment, clearly within the doctrine of *Hoover, assignee, vs. Wiese, supra.*

It is difficult to reconcile this decision with that of *Dickerson vs. Wason*, 47 New York, 439, and *Sweeny vs. Easter*, 1 Wallace, 166. But it is not for me to reconcile these cases; the case of *Hoover vs. Weise* being the latest expression on that subject, it must be regarded as the law, by this Court.

The defendant is, therefore, entitled to a judgment.

JOHN V. FARWELL *et al.* vs. C. D. CURTIS.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—APRIL, 1876.

1. BANK CHECKS—DUTY OF HOLDER.—If payment of a check is not regularly demanded, and the bank fails after the time it should have been demanded, the loss falls on the holder. If the check is presented and not paid, notice of dishonor must be given the drawer, in order to charge him.

2. The holder of a check cannot extend the time for which the drawer would be liable.

3. DUTY OF HOLDER.—The drawer had a right to have his check paid on the day presented, if there are funds to meet it, and it is the duty of the holder to see that it was so paid, or protested; and if the holder accepts the check or draft of the bank in payment, in lieu of money, he must present and collect it the same day, or he is chargeable with *laches.*

4. PRESENTATION BY MAIL.—If the payee sends a check by mail to the drawee for collection and return, he makes the drawee his agent, and must bear any loss arising after the time when the check could have been presented by express or other usual method.

Action to recover the price of certain goods sold by plaintiff to the defendant in April, 1875. The defense was payment, and the issue was tried by the court.

Tenneys, Flower & Abercrombie, for plaintiffs.

Vilas & Bryant, for defendant.

HOPKINS, J.—The real point of the defense is, whether a check given by defendant on the 5th of April, 1875, for $800, was and is to be held as a payment. The parties have stipulated the facts to be as follows: That on the 5th day of April, 1875, the defendant, a resident of New Lisbon, in this state, purchased goods of plaintiffs in Chicago, their place of business, to the amount of $800 and over, and on that day gave his check to the plaintiffs for the sum of $800, upon the bank of New Lisbon, a banking house doing business in that place, to apply as payment towards the goods so purchased by him to that amount; that the plaintiffs on the same day sent the check per mail to the bank, the drawees, with instructions to collect and return; that there is a daily mail between Chicago and New Lisbon; and the check was received at the bank of New Lisbon on the morning of the 7th of April, and was paid out of the defendant's funds on deposit in the bank, there being sufficient for that purpose, and charged to his account; that the bank on the 7th of April, sent to the plaintiffs, through the mail, a draft for the amount of the check on the Union National Bank, Chicago, which was received by them on the morning of the 9th, which they on that day deposited in the Bank of Montreal, of Chicago, for collection, which was on the 10th of April presented to the Union National Bank for payment, and not paid, and was returned on the same day to the plaintiffs, who, on the same day, wrote the New Lisbon Bank that the check would go to protest if not paid on Monday, and to defendant that it was not paid, and asking him "to poke up the bank on the matter." Not being paid, it was protested on Monday, the 12th, of which defendant was notified per mail.

It is further stipulated that the bank of New Lisbon could have paid said check in money up to the 10th day of April; but that on the close of the day's business on that day it stopped

payment, having up to that time paid all checks presented for payment; that the bank had not the funds in the Union National Bank to meet the draft when they drew it, nor authority to draw it without funds.

These are the material facts established by the evidence, and the question is, whether the plaintiffs were guilty of such negligence in presenting the check and demanding payment, as to discharge the drawer.

The practice of sending checks by mail to the drawee I think is not usual, and has not received much judicial consideration, and not any direct sanction that I can find. In Morse on Banking, page 334, he says it is a good presentment, and cites for his authority, *Bailey vs. Bordenham*, 10 Law Times, N. S., 422. I have examined that case, and it gives some countenance to his assertion, but I think the point is not absolutely decided.

In these days when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object. In this case there is a daily mail, by railroad between Chicago and New Lisbon, and a daily express also, with route agents and local agents, which furnished ample opportunities for presentation at the bank counters, as early as the morning of the 7th of April, and probably on the morning of the 6th, if it had been sent by the first opportunity. But if sent by the last train on the 6th, it would have reached New Lisbon on the morning of the 7th, and could have been collected and returned so as to have reached the plaintiff by the morning of the 8th of April. To send by mail to the drawees with instructions to collect and return, under such circumstances, is hardly equivalent to a demand at the counter for payment. The bank could not have paid the currency if it had it, there was no one to pay it to. The admission is that the bank was paying and had the money to pay up to and including the 10th, so that if the money had been asked on the 7th, it would have been paid. Now, as

the plaintiff adopted another course than the one which the exercise of ordinary care and diligence would have dictated, and loss has resulted by reason of it, they should stand it. But it may not be necessary to settle this point, as Morse, who says a presentation by mail is good, as well as the case cited by him to support the assertion, says, also, that when the holder sends by mail to the drawee directly, if the money does not come back by the return mail, notice of dishonor should be given. Adopting this rule would not relieve these plaintiffs, for they did not comply with it, the money did not come back by the next mail, nor was the check protested as required. But instead of the money, on the 9th, four days after the receipt of the check, a draft came back on the Union National Bank, but that was not presented until the 10th for payment, and was not protested until the 12th, so that conceding that the presentation by mail was sufficient, the plaintiff was guilty of *laches* in not presenting the draft before the 10th. This delay is inexcusable according to any rule of diligence that I know of, so that assuming that Mr. Morse states a safe and satisfactory rule, it does not exonerate these plaintiffs from *laches*. But I think if the time is extended beyond what it would have been if sent by the usual and ordinary modes, that is, by express, or to some party to present, and beyond the period established by law as reasonable for presentation, and a loss happens by reason of the failure of the drawee, the payee of the check is alone chargeable unto it.

For instance, in this case, it is admitted that the bank had the money to pay the check up to and including the 10th, so that if payment had been demanded in the usual way, it would have been paid, and if the parties chose to make the drawee their agent, and the drawee as their agent sent a worthless draft instead of the money, which he would have paid to any party presenting the check at the counter, and charged the check to the drawer, the same as if paid in money, so that he had no right to enforce his claim or power to pro-

tect himself; the payee instead of the drawer, should incur the loss that ensued by the subsequent failure. The charge to defendant's account was made on the 7th of April, in the morning, and the check marked paid, and what was done after that time was done by the bank at plaintiff's request, and as their agent, and whether in good or bad faith on the part of the banker, the defendant is not to blame or chargeable therewith, or for any loss resulting therefrom.

The common or commercial law has fixed certain times within which checks must be presented to the drawees for payment, and when it appears that the bank was paying during that time, and the drawer's account was good for the same, and the refusal or failure to obtain payment after, was by reason of the failure of the bank occurring subsequent thereto, the loss has to be borne by the payee or holder of the check. That rule is, in cases where the parties all reside in the same place, that it must be presented for payment before the close of business on the day following its date or delivery to the payee; and in cases where it is drawn upon a bank at another place, it must be sent at the fartherest, by the last mail on the next day after it is received, and be presented by the party receiving it on the day following the reception by him.[1]

If not thus regularly demanded, and the bank or bankers should fail after those times, the loss will be the loss of the holder, who is considered as having made the check his own by his *laches*. If the check is presented and not paid, notice of dishonor must be given the drawer, in order to charge him. Now, in this case, it is plain that the plaintiffs did not observe these rules. They sent the check in time, and if the presentation by letter was a good demand, it was presented on the 7th in the morning; then it should have been paid on the 7th, and if not, the drawer should have been notified of its non-payment. But instead of being paid in money it was

1 *Smith vs. Janes*, 20 Wendell, 192; Story on Promissory Notes, 493.

paid by draft on Chicago, and it is claimed that the plaintiffs had time to present that, to see whether it would be paid, and that if not paid, they could then protest the check. This is not the law. The holder of a check cannot in that way extend the time for which the drawer would be liable. The drawer had a right to have his check paid on the day presented, and it was the duty of the holder to see to it that it was so paid, or if not, protested, and if the holder accepts the check or draft of the bank in payment in lieu of money, he must present and collect it the same day, or else he is chargeable with *laches*. He cannot, as in this case, keep it for three days and then go back upon the drawer of the check if it is not paid, as by so doing he would extend the drawer's liability for two days beyond the time fixed by the law.[1]

This point is directly decided in *Smith vs. Miller*, 43 New York, 171. In that case the check of the drawee was taken and presented at the bank on the following day—but before its presentation the drawers of the check had failed. The party accepting the payment thereupon protested the draft which they received it in payment of, and brought suit to recover the amount of the draft, claiming that as the check was presented on the next day after its date, it was duly presented, and if not paid, the draft for which it was given was not paid.

On the contrary it was claimed that as the drawers of the check were paying all of the day on which it was given, and that if it had been presented on that day it would have been paid, and that as it was taken in lieu of the money, it should have been presented on that day, that the party could not have the whole of the next day to present a check taken under such circumstances, which was sustained by the court, which said:

"It was the duty of the plaintiffs to present the check at the bank, at least during the day on which they received it,

1 *Alexander vs. Burchfield*, 7 Manning & Granger, 1061.

and obtain either the money or a certificate, or cause the same to be protested for non-payment, and not having done so, they were chargeable with negligence and the consequent loss."

Here, even giving the plaintiffs the benefit of the time allowed when sent by mail, as in other cases, and they are guilty of negligence, they received the banker's check on the 9th, but delayed presenting it for payment to the Union National Bank until the 10th. Certainly such negligence cannot be tolerated in treating with paper that they had taken in lieu of money, without the consent or knowledge of defendant. The plaintiffs cannot hold the defendant liable on his check during the time they were thus experimenting with the check they received from the bankers, in payment of his check to them.

The bankers may have, and probably did, practice a fraud upon the plaintiffs when they sent this draft on the Union National Bank. But the defendant is not chargeable with that. He can say to the plaintiffs: "If you had sent the check to a party here to present in the usual way it would have been paid, and I have a right to require you to pursue the ordinary course in such case, and if you depart therefrom, and are defrauded by your agent, which in this case was the banker, it is your loss, and you alone are liable, as you brought it unnecessarily upon yourself."

Under the evidence, the defendant must therefore have judgment.

Acceptance of certification of a check instead of payment releases the drawer, and renders the collecting bank responsible, ***Essex County National Bank vs. Bank of Montreal***, *post p.* 193 [*Reporter.*

In re SAUTHOFF AND OLSON.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—APRIL, 1876.

IN BANKRUPTCY.

1. MARSHALLING OF ASSETS.—MODE OF MARSHALLING.—A creditor who held several judgment notes against a person afterwards declared bankrupt, and also mortgages and two insurance policies as collateral security, a few days before the filing of the petition in bankruptcy, caused judgment to be entered upon the notes, and executions to be issued thereon. *Held*, that the court had power to so marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund.

2. MORTGAGE LOANED BY THIRD PARTY TO BANKRUPT.—This rule would not extend to a mortgage loaned by a third party to the bankrupt, to be used as a security for the payment of the judgment notes. The rights of the assignor of such a mortgage would be superior to those of the assignee in bankruptcy.

3. POLICY PAYABLE TO WIFE.—The same principle applies to the case of a policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee. But the mortgage of the bankrupt and wife, to the petitioner, and the policy of insurance payable to the bankrupt in this case, fall within the general doctrine of marshalling securities, and the petitioner to that extent is to be regarded as doubly secured, and should be required to first exhaust his remedy on them, and be allowed the balance out of the general fund in court.

4. HOMESTEAD.—The fact that a part of the property is a homestead does not change the rule requiring a party having security on two funds, to first exhaust his remedy upon the fund he alone was secured upon, where there is another party having security on the other alone.

Application by John J. Suhr for an order directing payment of three judgments in his favor against the bankrupts, entered on the 3d day of April, 1876, upon their promissory notes, by virtue of separate warrants of attorney attached to each. The judgments in the aggregate amount to about $3,000. No question is raised as to the validity of the judgments, the facts as admitted being that the notes were dis-

counted in the usual course of business by petitioner, who is a banker, and that the warrants to confess judgment were attached to and accompanied by the notes, and were given more than two months before the petition against the bankrupts was filed. There is no charge that the bankrupts in any way procured the entry of judgments except by giving the warrants of attorney to confess.

On the day the judgments were entered, executions were issued on each, and a sufficient portion of the bankrupts' stock in trade was seized to satisfy them. The other creditors instituted proceedings in bankruptcy, on the 6th of April, and, after an assignee was appointed, the parties agreed that the goods might be sold by the assignee and the proceeds be kept separate and deposited in the registry of this court, and that the lien of the executions should be transferred to the fund in court with the same force as it existed on the goods by virtue of the levy.

The petition further shows that, as collateral security to the debt of the petitioner, the bankrupt, Sauthoff, assigned to him a policy of insurance upon the life of his wife, payable to him, and that he and his wife assigned another policy upon his life, payable to his wife, and that the bankrupt procured his brother, Wm. Sauthoff, to assign as further collateral security, a note and mortgage, belonging to him, upon the homestead of the bankrupt, upon which there was due one thousand dollars, and that the bankrupt and his wife gave as further collateral security another mortgage upon the homestead of $1,000, all which were duly transferred to and held by the petitioner as collateral security for his debt against the bankrupts.

Sloan, Stevens & Morris, for John J. Suhr.

H. M. Lewis, for assignee.

HOPKINS, J.—By means of these securities and of the judgments which he took, the petitioner had ample security, and

will get his pay in full, while the other creditors will not get to exceed one-half of theirs.

The assignee has sold the property for enough to pay all of the judgments out of which petitioner makes this application for payment.

The assignee opposes the application, and insists that the petitioner should be required, first, to exhaust the other security that he has, and only receive out of the fund in court the amount that may remain after applying the avails of the other securities. He insists upon the application of what he claims to be the rule in equity, that as the petitioner has security upon two funds for his debt, while the general creditors, represented by the assignee, have security on but one, he should be required to resort first to his security upon which the other creditors have no lien.

The general rule in equity is, that where there are several creditors having a common debtor, who has several funds, all of which can be reached by one creditor, and only a part by the others, the former shall take pay out of the fund to which he can resort exclusively, so that all may be paid. This principle enforces the right of the creditor having a lien upon all the funds to be paid in full, but it requires him to obtain it out of such portions of the funds as will cause the least inconvenience and injury to the creditors whose liens are confined to one fund. In this way no wrong is done to the one who has all the funds within his reach. His lien is not impaired as to either fund. The authority of the courts over him only extends to directing him which he shall first appropriate to his claim, restraining him, during such reasonable time as may be necessary to successfully make such application, from proceeding to appropriate the other; keeping the other sacred, however, in the mean time, to make up any deficiency. The common debtor can not complain of this rule, for he is benefitted by having a larger portion of his debts paid by pursuing this course than if all the funds were needlessly exhausted by a single creditor.

But it is uniformly held that courts should not exercise this power to the material injury or prejudice of the creditor holding both funds. But this restriction does not extend so far, as was contended by petitioner's counsel, as to deprive the court of the exercise of the power in all cases where the creditor may be somewhat delayed in his remedies, or where the time of obtaining payment may be somewhat postponed. If it did, it would defeat the operation of the rule in most cases, for in almost every conceivable case, some time would be necessarily required in converting a security of any kind into money, and a delay of some extent is therefore inevitable in the practical application of the doctrine of marshalling securities. But a mere delay or postponing of payment is not regarded in such cases as a material injury, for the interest on the claim is deemed an adequate compensation to the party for such delay. Interest is deemed a sufficient compensation for the delay of payment, which is incident to all judicial proceedings.

The remedy to render available the security should also be certain and direct, before a party should be required to adopt it, and defer other remedies that he is entitled to, in order to obtain satisfaction of his debt.

In this case the remedy of the petitioner is quite simple. An action to foreclose a mortgage and sell the property is not a difficult or uncertain remedy, and a party could hardly maintain the position that a security so easily converted into money as a mortgage, and by so expeditious a method as exists in this state, was a doubtful remedy, or would unreasonably delay him or materially injure or prejudice his rights. Courts of equity exercise this power in such cases—not as an independent equity that exists against the creditor; for, as the writers on this subject say, no equity can be created against the creditor holding the double fund security by a party who has an imperfect security. But they say it is an equity against the debtor, for to allow the doubly secured creditor to take the doubly charged estate, would enable the debtor to

get back the singly secured estate discharged of both debts. This would be literally true in this case, for when the special sureties are released from the petitioner's claim, they will all go back to the debtor, and they cannot be reached by the assignee in his hands. So that the right sought to be enforced is rather an incident to the equity against the common debtor, and is free, if judicially applied, from all objection or charge of injustice.[1] This doctrine is analagous to that which gives a surety the right to compel the creditor to exhaust this remedy against the principal's property before resorting to him. Now what application is to be made of this doctrine in this case?

First: Is the mortgage assigned by William Sauthoff to the petitioner such a security that the assignee can require the petitioner to apply it upon his debts before using the general fund? I think not. That transaction was, in effect, but a loan of this mortgage to the bankrupt for that purpose, and that William occupies the position of a surety to that extent, and as such his rights are equal, if not superior, to the rights of the assignee, and if his rights are equal, the claim of the assignee is defeated. But I think they are paramount, and that he has a right to require that the petitioner first exhaust all property of the bankrupts upon which he has a claim to secure the same debts, and the right of the assignee, as to this mortgage, are subordinate to his.

The same principle applies in the case of the policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee as the representative of the general creditors. But the mortgage of the bankrupt Sauthoff and wife to the petitioner, and the policy of insurance payable to the bankrupt, fall within the general doctrine above stated on the subject of marshalling securities, and the petitioner to that extent is to be regarded as doubly secured, and should be required to first

1 Adams' Equity, 272; Willard's Equity, 337; Story's Equity Jurisprudence, § 634, *et. seq.*

exhaust his remedy on them, and be allowed out of the general fund in court, the balance remaining after applying the proceeds of those securities upon his debts.

The petitioner's counsel contended for the right to take the whole pay out of the general fund, and to leave the assignee to his rights of subrogation. But I do not deem that just in this case. The estate should not be burdened with litigation which would involve new and intricate questions, that would not arise in suits prosecuted by the petitioner. I can see no hardship in requiring him to collect those claims himself.

The petitioner's counsel also claims that as this mortgage was on the bankrupt's homestead, which was not liable for his debts in this state, and could only be incumbered or conveyed by the wife's joining her husband in a conveyance of it, that it should be considered in the nature of a security furnished by the the parties, the wife particularly, that was equally entitled to protection as the securities I have before referred to. He cited and relied principally upon the case of *Dickson vs. Chorn*, 6 Iowa, 19, as sustaining his position. In regard to that case, it is only necessary to remark that it was decided mainly upon the statute of that state, and therefore can not be regarded as an authority where the statute does not exist. In that case the creditor had a mortgage on the insolvent's homestead, which he cancelled voluntarily and sought full payment of the debt originally secured by the mortgage out of the general assets. The court ruled that as the statute required a creditor secured by a mortgage on a homestead to exhaust his remedy against the other property of the mortgagor before selling the homestead, the creditor had a right and it was his duty to collect his pay out of the general assets, if he could, before he could resort to his mortgage. This case, therefore, when properly understood, does not contravene the general equity doctrine hereinbefore laid down.

The Supreme Court of this state has, in two cases, considered the question substantially involved here. First, in *Jones*

vs. Dow, 18 Wisconsin, 241; and again in *White vs. Polleys*, 20 *do*, 503, and they do not recognize any such right in a mortgagor of a homestead in this state, as is contended for in this matter by petitioner's counsel. In the case of *Jones vs. Dow*, *supra*, the mortgage covered the homestead and a business block, and the mortgagor insisted that the business block should be sold first. But the court, it appearing that there were judgment creditors who had a lien upon the block and not upon the homestead, denied his claim, and the chief justice in delivering the opinion of the court, says: "Until the legislature shall declare the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this." And, in the other case, the question arose between a mortgagor, whose mortgage covered his homestead and other property, and a judgment creditor having a lien upon the other property only, and the court there held that the debtor had no right to have the property not included in homestead first exhausted, in order to preserve to him the homestead; that a part of the property being a homestead did not change the equity rule that required a party having security on two funds to first exhaust his remedy upon the fund he was alone secured upon, where there was another party having security on the other.

I fully concur in these views, and shall follow the doctrine of those cases in my disposition of this question.

The legislature has, since that decision, in suits to foreclose mortgages covering the mortgagor's homestead and other property, required the sale of the property not included in homestead first. But this is not such a suit, and the statute in terms, does not include a proceeding of this nature, or suits in equity for the marshalling of assets, and as it is in derogation of a long established principle of equity jurisprudence, I do not feel at liberty to extend its operation by construction beyond its plain reading.

I shall, therefore, order petitioner to collect and to exhaust

his remedy upon the mortgage of F. Sauthoff and wife, and the policy of insurance payable to the bankrupt, and to apply the avails upon his claim, and that he be paid from the general fund only what shall remain after such application. But as it is apparent that enough will not be realized therefrom to pay it in full, I shall order that he be paid now $2,000 to apply thereon, retaining enough to meet any balance, if there should be any. Perhaps the assignee and petitioner may be able to agree upon a valuation of these securities and upon a sum at which the petitioner will be willing to take them, in which case, if approved by the Court, the matter may be at once closed.

The clerk will enter an order in accordance with the terms of this opinion.

THE UNITED STATES vs. PHILIP GOLDBERG *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—MAY, 1876.

1. CONSPIRACY.—A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense.

2. PROOF.—To establish the guilt of a party accused of this crime it must be proved.

(1.) That the conspiracy was formed to commit the offense described in the indictment.

(2.) That the accused were parties to the conspiracy.

(3.) That to effect the object of the conspiracy, one or more of the parties thereto did one or more of the acts alleged.

3. ACT OF ONE ONLY.—An act done by only one of the parties to effect the object, binds each and all the parties to the conspiracy and completes the offense as to all; for in that case the act of one becomes the act of all.

4. PRECISE TIME NOT ESSENTIAL.—It is not essential that the conspiracy be shown to have been formed at the precise time or times alleged in the indictment.

5. CIRCUMSTANTIAL EVIDENCE—may be sufficient to prove a conspiracy.

6. TESTIMONY OF ACCOMPLICES—though competent, should be received and scrutinized with great caution.

7. A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, does not constitute the offense.

8. ACTS OF CO-CONSPIRATORS.—When the existence of the conspiracy and the connection of the defendant therewith is established by independent evidence, he is bound by the acts and declarations of his co-conspirators.

9 The law of conspiracy fully discussed.

Indictment for conspiracy.

J. C. McKinney and *L. S. Dixon*, for United States.

N. S. Murphey and *G. B. Goodwin*, for defendants.

DYER, J.—Charged the jury as follows:

Gentlemen:—It is charged in the first count of the indictment, that on the 24th day of July, 1875, the defendants, Philip Goldberg, Julius Jonas and A. M. Crosby, conspired together to wilfully take and carry away, with intent to steal and destroy, certain papers, documents and records known as "Returns of Gaugers of Spirits," form 59, and as "Rectifier's Notice of Intention to Rectify," form 122, and other papers and documents then filed and deposited with John M. Hedrick, a supervisor of internal revenue of the United States.

As acts to effect the object of this alleged conspiracy it is charged in this count, that on the 25th of July, 1875, the defendants Philip Goldberg and Julius Jonas, at Milwaukee, asked and demanded from Leopold Wirth, Henry Schanfield, Louis Rindskopf, William Bergenthal, Samuel Rindskopf, and Robert Kiewert, $50,000 with which to hire and induce certain persons to steal, take and carry away the said papers, documents and records; and that on the 26th of July, 1875, the defendants Philip Goldberg and Julius Jonas, at Milwaukee, did meet, consult and confer together, and with Leopold Wirth, Louis Rindskopf, William Bergenthal, and other persons, to devise plans and means to steal, take and destroy said papers, documents and records, and traveled from Milwaukee to Chicago, and on the 29th of July, 1875, returned from Chicago to Milwaukee, and on that day at Milwaukee consulted and conferred with Samuel Rindskopf as to the means to be adopted to take and carry away from the possession of John M. Hedrick said papers, documents and records.

The second count charges a conspiracy formed July 28, 1875, to wilfully take and carry away, with intent to steal and destroy, certain papers, documents and records in form required by regulations prescribed by the commissioner of internal revenue, and filed and deposited in the office of the collector of internal revenue for this district, which papers and documents were known as "Rectifier's Notice of Intention to Rectify," designated as form 122, a large number of which were given and made to the collector by Aaron Schœnfeld,

as a rectifier, and a large number of which were given and made by Samuel, Elias, Jacob and Max Rindskopf, as rectifiers of distilled spirits to the collector.

As overt acts to effect the object of the alleged conspiracy it is charged in this count, that on the 28th of July, 1875, at Milwaukee, the defendants met, conferred and consulted with Samuel Rindskopf, Leopold Wirth, Henry Schanfield, William Bergenthal, and Louis Rindskopf, as to the mode and manner in which the papers, documents and records could be taken and carried away; and asked and demanded from those parties $50,000 as a reward for taking and carrying away the papers, documents and records, and proceeded to Chicago for the purpose of meeting and consulting with Louis Rindskopf, Leopold Wirth and Robert Kiewert, as to the means to be adopted; and at Chicago did meet and confer with those parties, and there devised opportunities and means to take and carry away the papers, documents and records, and on the 29th of July, 1875, proceeded from Chicago to Milwaukee for the purpose of taking and carrying the same away.

The third count charges a similar conspiracy, as formed July 28, 1875, to take and carry away with intent to steal and destroy, papers, documents and records, which were deposited with John M. Hedrick, supervisor of internal revenue, and which purported to be returns of spirits gauged by William H. Roddis in April, 1875, and in form required by regulation prescribed by the commissioner of internal revenue, and designated as form 59; also other papers, documents and records deposited with John M. Hedrick, supervisor, relating to the business of Simon Meyer, Aaron Schœnfeld, and of Samuel, Elias, Jacob and Max Rindskopf, as rectifiers, and to the business of other persons who were rectifiers in this collection district; also other papers, documents and records filed and deposited in the office of the collector of internal revenue, purporting to be returns of gaugers of spirits, designated as form 59, and filed and deposi-

ted in said office by John E. Fitzgerald, John S. Taft and William H. Roddis, as internal revenue gaugers, and other papers, documents and records deposited in the collector's office, and all of which were required by law and regulation to be there filed and deposited, and related to the business of certain persons who carried on the business of rectifiers of distilled spirits in the first collection district, in the months of March and April, 1875.

As acts to effect the object of the conspiracy, it is alleged in this count that on the 29th of July, 1875, at Milwaukee, the defendants asked and demanded from Leopold Wirth, Henry Schanfield, Louis Rindskopf, William Bergenthal, Samuel Rindskopf, and Robert Kiewert, the sum of $50,000, with which to hire and induce certain persons to steal, take and carry away said papers, documents and records.

It is also charged that on the 30th of July, 1875, the defendants at Milwaukee met, consulted and conferred together, and with Leopold Wirth, Louis Rindskopf, William Bergenthal and other persons, to devise plans and means to accomplish the object of the alleged conspiracy, and traveled from Milwaukee to Chicago and returned from Chicago to Milwaukee, and there consulted and conferred with Samuel Rindskopf, as to the means to be adopted to take and carry away the said papers, documents and records.

This is the substance of the several counts of this indictment, and I have thus particularly called your attention to the allegations of each count, because it is important that they be borne in mind by you in considering the evidence.

By section 5403 of the statutes of the United States, it is made an offense for any person to wilfully destroy, or attempt to destroy, or, with intent to steal or destroy, to wilfully take and carry away any paper, document or record filed or deposited in any public office, or with any public officer.

Section 5440 of the statutes provides that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect

the object of the conspiracy, all the parties to such conspiracy shall be liable to certain punishment.

The charge in this indictment then is the formation of such a conspiracy as is made punishable by section 5440, namely: a conspiracy to commit an offense against the United States, which offense is that named in section 5403. The question, therefore, to be determined in this case is, was the alleged conspiracy formed by any two of the defendants to wilfully take and carry away, with intent to steal or destroy, the papers, documents and records mentioned in the indictment, or any of them; and if such conspiracy was formed, did any or either of the parties thereto, to effect the object of the conspiracy, do either or any of such of the acts charged in the indictment as constitute acts to carry into effect such object.

This indictment is against three defendants. The present trial, however, does not, and your verdict will not, include the defendant Crosby. The defendants Philip Goldberg and Julius Jonas only are now upon trial. As I have stated, the charge is one of conspiracy; that the defendants conspired to commit a certain offense against the United States. The questions, therefore, requiring your attention, to state them more explicitly, and in proper order, are these:

1. Was there such a conspiracy as is alleged in any or either of these three counts, and if there was, were the defendants Goldberg and Jonas, or either of them connected with the conspiracy?

2. If such a conspiracy was formed and existed, were any or either of such of the acts charged in the indictment as constitute acts to carry into effect the object of the conspiracy, committed as alleged?

I direct your attention, first, to what is essential to constitute a conspiracy.

A conspiracy is formed when two or more persons agree together to do an unlawful act—in other words, when they combine to accomplish, by their united action, a criminal or

unlawful purpose; and the statutory offense is consummated when such agreement is made, or such combination is entered into, and one or more of the parties does any act to effect the object of such conspiracy. If two or more persons agree together that they will commit a certain offense against the United States, as that they will enter a public office of the United States, and take and carry away papers and records there deposited, with intent to steal or destroy them, and one or more of the persons so agreeing does any act to effect the object of such agreement, they are guilty of the offense of conspiracy.

It is not necessary, to constitute a conspiracy, that two or or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly by words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design.[1]

Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy, unless the scheme or some proposed scheme is in fact assented to—concurred in by the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act.

As I shall have occasion hereafter more fully to state to you, a mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense. There must be both the corrupt agreement or combination, and an act or acts done by one or more

1 *United States vs. Babcock*, Vol. 3 Central Law Journal, 144.

of the parties to effect the illegal object or design agreed upon, to make the punishable offense under the statute. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way, and from any motive, or upon any consideration, work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy.

To establish the guilt of the defendants on trial you must be convinced upon the testimony, that a conspiracy was formed, as alleged, to commit the offense against the United States, which is particularly described in the indictment; that these defendants, Goldberg and Jonas, were parties to that conspiracy, if any; and that to effect the object of such conspiracy, one or more of the parties thereto did one or more of such of the acts alleged in the indictment as constitute an act or acts to effect the object.

It is not essential that the alleged conspiracy be shown to have been formed at the precise time or times stated in the several counts of this indictment. It is sufficient, so far as time is concerned, if it be shown that at about the time or times charged, there was a conspiracy between any two or more of the persons who are alleged to have conspired together to wilfully take and carry away, with intent to steal or destroy, any of the papers, documents or records mentioned in the indictment.

To establish a conspiracy, it is not, as I have already said, necessary that there should be "an explicit or formal agreement for an unlawful scheme" between the parties, nor is it essential that direct proof be made of an express agreement to do the act forbidden by the law. It is as competent to prove an alleged conspiracy by circumstances as by direct evidence.

In prosecutions for criminal conspiracies, the proof of the combination charged must almost always be extracted from

the circumstances connected with the transaction, which forms the subject of the accusation.[1]

The understanding, combination or agreement between the parties in the given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding, there is no conspiracy, but, as I have just said, circumstantial evidence may be resorted to, to show the agreement or conspiracy. The acts of parties in the particular case, the nature of those acts, their declarations and statements, whether verbal or in writing, and the character of the transactions or series of transactions with the accompanying circumstances, as the evidence may disclose them, should be investigated and considered, as sources from which evidence may be derived of the existence or non-existence of an agreement which may be express or implied to do the alleged unlawful act. The government here affirms the formation and existence of a conspiracy to commit a particular offense against the United States, and that these defendants were parties to such conspiracy. The burden is therefore upon the government to prove what it thus affirms by legal and competent evidence, in order to ask a verdict in its favor.

Now I have said to you, that to constitute the offense which is made punishable by the statute, there must be not only the conspiring together by the parties, but the formation of the conspiracy must be followed by an act done by one or more of the parties to the conspiracy to effect its object. At common law it was an offense for two or more persons to merely confederate and combine together by concerted means to do that which is unlawful or criminal. But in settling the criminal liability of these parties, we have to be governed by the statute; and as, in order to convict, the statutory offense must be proved, it is not sufficient to show merely that a conspiracy was formed. Persons may conspire together to commit an offense against the United States;

1 Wharton on Criminal Law, § 235

the conspiring together may be complete, yet if the proceeding stops with the mere agreement, and no act is done to carry into effect the object of the agreement or conspiracy, no criminal offense has been committed. Acts and deeds are the subject of human laws, not mere thoughts and intents unless accompanied by acts, and the theory of the law is, that when persons merely form a conspiracy and there pause in their proceeding, and do no act to effect its object, they are to be regarded as having repented of the act of conspiring, and are not to be punished for that alone. But the moment any act is done to effect the object of a conspiracy, that moment criminal liability is fixed; and this act to effect the object, though it be done by only one of the parties, binds each and all the parties to the conspiracy and completes the offense as to all, for in that case the act of one becomes the act of both or all. So, gentlemen, if you should find that the defendants conspired together as charged in the indictment, to wilfully take and carry away these papers, records and documents with intent to steal or destroy the same, you will then inquire whether the defendants or either of them, did any or either of such of the acts charged in the indictment as constitute acts to effect the object of the conspiracy.

The act must be one, you will observe, to effect the object of the conspiracy. That must be the character of the act. It must not be an act which is part of the conspiracy—it must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent, independent act following a completed conspiracy, and done to carry into effect the object of the original combination. To illustrate, two persons conspire to take the life of another. It is agreed that it shall be done. The conspiracy is complete, but there is yet wanting the act to effect the object of the conspiracy. One of the parties purchases or procures the weapon with which to do the deed; there you have an act to effect the object, and the punishable offense is fully committed. So if the parties subsequent to the formation of a

complete conspiracy, following it up and as independent acts, hold consultations between themselves and others as to the means to be employed to carry the conspiracy into effect, or go from place to place and confer about and arrange as to the particular means or instrumentalities that shall be used or employed to effect the object of the conspiracy, these constitute acts to effect such object.

Now, if there was this alleged conspiracy, there must be proved such acts to effect its object as are alleged. Some one or more of the overt acts charged in the indictment must be proven, in order to sustain a conviction, and the acts as proven, if any, must be acts to effect the object of the conspiracy. There are three general classes of overt acts charged:

1. Demands of money with which to hire and induce certain persons to take, carry away and steal the papers and records in question, and as a reward for taking and carrying the same away.

2. Journeys from Chicago to Milwaukee and from Milwaukee to Chicago for the purpose of holding conferences and consultations with parties named in the indictment, to devise means and opportunities to take and carry away the papers, records, etc.; and in the second count, there is an allegation of a journey from Chicago to Milwaukee for the purpose of taking and carrying away the papers.

3. Consultations and conferences with the persons named in the indictment as to the mode and manner in which and to devise means and opportunities by which the papers, documents and records could be taken and carried away.

The simple question upon this branch of the case is, were any or either of these acts done, by any or either of the defendants, and if so, were they acts independent of and to carry into effect a completed conspiracy formed by the defendants to take and carry away with intent to steal or destroy the papers, documents and records in question. Upon all the evidence and upon all the circumstances as disclosed to you, you are to determine the question.

I have stated to you, gentlemen, the general rules and principles upon the subject of conspiracy and overt acts, applicable to this case. There are some more particular considerations, to which I now direct your attention.

The offense charged, is a conspiracy to take and carry away with intent to steal or destroy the papers, records and documents mentioned. It is this conspiracy, therefore, that it is incumbent upon the prosecution to prove. Proof of a combination for any other purpose is not sufficient. Proof of a scheme to obtain by consent of a public officer having them in his custody, access to and inspection of the papers, documents and records, would not meet the requirements of this indictment, unless there was the purpose to take and carry away with intent to steal or destroy such papers and records.

It is claimed by the prosecution that the alleged conspiracy was formed by and between the three defendants Goldberg, Jonas and Crosby; that it was not a conspiracy between those defendants and the Milwaukee parties, but that first the conspiracy was formed between those defendants, and then, that what transpired between them or any of them and the Milwaukee parties, were acts to effect the object of a previously formed conspiracy.

It is claimed on the part of the defense that there was no such previously formed and completed conspiracy, and that what took place between the defendants and the Milwaukee parties were not acts to carry into effect any such conspiracy; that whatever was said or transpired between the defendants and the Milwaukee parties was but part and parcel of an incomplete, unperfected transaction between the defendants and persons in Milwaukee, and before completed was wholly abandoned. On this subject I charge you that if you find from the evidence that the alleged demands of money, conferences, consultations and journeys, if made and had, were part and parcel of an uncompleted transaction, combination or arrangement between the defendants and the Milwaukee parties, and were not preceded by such a perfected conspiracy

between the defendants as is alleged, then such demands, conferences, consultations and journeys, if any, did not, nor did either of them have the necessary character of overt acts, and the offense charged is in that event not established. Further, if you find from the evidence that up to the time of the alleged meeting of one or more of the defendants with the Milwaukee parties, no conspiracy had been formed as alleged between the defendants, and you find that the defendants had one or more consultations with some, or any of the Milwaukee parties, wherein the project of stealing or destroying the papers and documents described in the indictment was talked over with a view to forming such conspiracy, but that the scheme was for any cause then abandoned, and no agreement, combination or understanding was made or concluded by and between the defendants or any two of them, to take and carry away said papers and documents with intent to steal or destroy the same, then and in that case no conspiracy is proven, and your verdict should be for defendants. A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, when as yet no conspiracy has been formed, does not meet the requirements of the law.

But if the defendants, or any two of them, formed a conspiracy to take and carry away these papers, documents and records, with intent to steal or destroy the same, and if upon the complete formation of such a conspiracy by and between themselves, either of the defendants made the journeys or demands of money, or held the consultations and conferences alleged, as acts to effect the object of a previously formed conspiracy, then the offense as charged was committed.

As the defendants on trial are indicted for conspiracy with another person named in the indictment to take and carry away the papers and records in question, with intent to steal and destroy the same, it is clear that the charge implies that they knew there was such a conspiracy, and with such knowl-

edge became parties to the unlawful scheme, and the alleged guilty participation must be proved by the government. Guilty connection with a conspiracy may be established by showing association by the person accused, with others, in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design; but each may perform separate acts or hold distinct relations in forwarding that design.

If two persons pursue by their acts the same object, one performing one act or part of an act, and the other another act or another part of the same act, so as to complete it with a view to the attainment of the object they are pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object.[1]

Co-operation in some form must be shown. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose. If parties in any manner work together to advance the unlawful scheme, having its promotion in view, and "actuated by the common purpose of accomplishing the unlawful end," they are conspirators. If a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a view to forwarding the enterprise or scheme, assists in its prosecution, he becomes a conspirator. Upon this subject I charge you in substance as asked by the defendants' counsel as to the defendant Jonas, that if you find from the evidence that a conspiracy was formed, as alleged, between the other defendants, but that the prosecution has failed to prove that the defendant Jonas intentionally participated in the transaction, knowing it to be such conspiracy, and with a view to the advancement of the common design, then your verdict as to him should be not guilty. As to both defendants on trial, it must be shown by the evidence (beyond

1 3 Archbold's Criminal Practice, 622.

reasonable doubt) that they knowingly and designedly assented to and united in the unlawful combination charged, if any such existed, in order to make them parties thereto; and the fact upon this branch of the case you must determine upon all the evidence before you.

Now I have said that in determining the question of the formation or existence of a conspiracy, the acts and declarations of the persons accused may, among other circumstances, be looked to and considered by the jury. Statements of one and in some instances of two of the defendants in the absence of the other defendant, and conversations with some of the witnesses, on the part of one or more of the defendants in the absence of the other, have been given in evidence. The individual letters and telegrams of the different defendants have also been introduced. It is proper that I should say to you that this evidence was admitted as bearing upon the question of the existence of a conspiracy and its nature, if any there was, and as shedding light upon the relation of the person so speaking to the transaction. These declarations, statements and communications were and are admissible as bearing upon the question of the existence of the alleged conspiracy, and as touching the alleged connection of the persons making the same therewith. If a conspiracy be shown to exist, the question then follows, were the defendants on trial, or either of them, connected with that conspiracy as parties thereto. To establish the connection of either of the defendants therewith, such connection must be shown, by facts or circumstances, independent of the declarations of others, or by his own acts, conduct or declarations. And until this fact is thus established, he is not to be bound by the declarations or statements of others. The principle of law and rule of evidence is that when once a conspiracy or combination is established, and a defendant's connection therewith is shown by independent evidence, then he is bound by the acts, declarations and statements of his co-conspirators, because in that event each is deemed to assent to or com-

mand what is done by any other in furtherance of the common object.[1]

So in considering the testimony given as to the acts, declarations and statements of either one of the defendants when the other defendant or defendants was or were not present, you are to understand that that testimony was submitted to you for the purpose of showing in the first instance that there was a conspiracy formed and existing, and that the person or persons making the declarations, statements and communications were parties to it; that the alleged connection of any one of the defendants with the alleged conspiracy, if any existed, must be shown by facts or circumstances independent of statements of other defendants in his absence, and that when once that connection be thus shown, then he becomes affected and bound by the declarations and acts of other parties to the conspiracy, if any, made and done in the course of the prosecution of or pending the enterprise and during his connection therewith.

If you should believe from the evidence that any project was discussed or even a combination was formed by the defendants or any two of them to take and carry away with intent to steal or destroy the papers and records described in the indictment, and that such project or combination was wholly abandoned by the defendants before any act done to effect its object, then you should disregard and should not consider any statement, declaration or act of any one of the defendants as affecting either of the others made or done after such abandonment.

So, too, if you should find as a fact such abandonment under the circumstances just stated, and that thereafter Samuel Rindskopf individually employed the defendant Crosby to procure abstracts of evidence, or releases of property seized, or to do other acts as an employe for said Rindskopf or for Rindskopf Bros., and if you should find that any portion of the correspondence in evidence, between

(1) 1 Wharton, 702.

Crosby and Rindskopf, was subsequent to such abandonment, and that it related to such employment and business pertaining thereto, and that the defendants Goldberg and Jonas were not parties to and had no connection with such employment or arrangement between Crosby and Rindskopf; then that portion of such correspondence should not be considered by you as evidence against the defendants on trial.

Further, if you should find that there never was a conspiracy between the defendants to take and carry away with intent to steal or destroy the papers and records in question, but that the defendants Goldberg and Jonas understood that the acts to be accomplished by them and Crosby, were to procure abstracts of evidence in the Supervisor's and Collector's offices in a lawful way, and to furnish an attorney to defend the Milwaukee parties and to procure a release of goods seized by the government, or to procure a settlement or compromise with the government, and that Crosby, without the knowledge, direction or procurement of Goldberg or Jonas, said to the Milwaukee parties that he would or could get some one else to steal or destroy the papers or records, then, and in such case, the defendants Goldberg and Jonas should not be bound by such declarations of Crosby in that regard.

If, however, the alleged conspiracy be shown and the defendants' connection therewith be established, then each party is bound by the declarations of the other made while the conspiracy is pending or is being prosecuted.

I have said that to establish a conspiracy, or the connection of a party therewith, direct proof is not indispensable, and that it may be shown by circumstances. Where the prosecution in a criminal case rely upon circumstantial evidence, that is, upon proof of the facts or circumstances which are to be used as a means of arriving at the principal fact in question, it is a rule that these facts or circumstances must be proved in order to lay the basis for the presumption which is sought to be established. Each circumstance essential to the conclu-

sion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance. When the facts and circumstances depended upon to establish the principal fact are thus proved, the circumstantial evidence thus produced may generally be relied upon with safety in arriving at a conclusion as to the guilt or innocence of the person accused. The burden of proof throughout is upon the prosecution to prove the guilt of the defendants. To what I have thus far stated it is proper to add, that in a case depending upon circumstantial evidence, the rule is that first "the hypothesis of delinquency or guilt of the offense charged in the indictment should flow naturally from the facts proved and be consistent with them all, and second, the evidence must be such as to exclude every reasonable hypothesis but that of his guilt of the offense imputed to him; or in other words, the facts proved must all be consistent with and point to guilt only, and must be inconsistent with innocence." [1]

Witnesses have been called in the course of the trial who testify to their own participation in fraudulent and criminal practices, and some of whom are under indictment for such practices in this court, and have pleaded guilty to the charges presented against them. There has been much criticism of their testimony, and considerable discussion of the question as to the weight to which their testimony is entitled. The court instructs you upon this subject, that it is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the government has the right to use them as witnesses. It is the duty of the court to admit their testimony, and that of the jury to consider it.

The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care by the jury, who should not rely upon it unsupported, unless it produces in their minds the most

1 *People vs. Bennett*, 49 New York, 137.

positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in material respects. But this is not absolutely essential, provided the testimony of such witness produces in the minds of the jury full and complete conviction of its truth.

You must be convinced beyond reasonable doubt that the defendants on trial have committed the offense or offenses charged, in order to convict them. Each and every fact necessary to constitute the offense, must be so proved—that is beyond reasonable doubt. Until guilt is proven there is an absolute presumption of innocence. The law does not permit the defendants to testify, and this presumption of innocence stands in their favor, until by competent testimony it is overthrown and guilt established beyond reasonable doubt. It is the settled rule in criminal cases, that a conviction cannot be secured upon strong suspicion or probabilities of guilt, nor, as in civil cases, upon a mere preponderance of evidence, though the weight and character of the evidence are to be passed upon by you in determining whether the charge or charges are proven beyond reasonable doubt. By reasonable doubt is meant an actual, substantial doubt that arises and rests in the mind as testimony is weighed and considered—that results after the exercise of judgment and reason when fairly and candidly applied to an investigation of the evidence.

If the evidence convinces you beyond reasonable doubt that the defendants on trial are, or that either of them is guilty as charged in the counts of this indictment, or either of them, then you should so find. If all the facts essential to constitute the offense or offenses charged are not established, and guilt is not proven beyond reasonable doubt, then the government cannot rightfully ask a conviction, and it would be your duty to acquit.

The indictment charges that the three defendants, Goldberg, Jonas and Crosby, conspired together to commit the

offense named. If you find that a conspiracy was formed by any two of the defendants named in the indictment, but that one only of the defendants on trial was a party to that conspiracy, and that the other was not, you should acquit the defendant so found not to be a party to it, and should convict he other, if found guilty.

Verdict, not guilty.

See *United States vs. Nunnemacher*, *ante*, p. 111 [REPORTER.

ESSEX COUNTY NATIONAL BANK vs. THE BANK OF MONTREAL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY, 1876.

1. ACCEPTING CERTIFICATION OF CHECK RENDERS COLLECTING BANK LIABLE.—A bank holding a check for collection and accepting the certification of the bank upon which it is drawn in lieu of payment, thereby assumes the risk of payment, and becomes liable to the owner for the amount of the check, with interest from the date of certification.

2. DAMAGES PRESUMED.—It is not necessary that the owner prove his damages; the law presumes them.

3. Nor is it essential that the bank on which the check was drawn, should have had the funds to pay it when presented.

Action to charge the defendant with the amount of a check transmitted to it for collection under the following circumstances:

P. Becker & Co., of Chicago, on the 3d day of August, 1875, sent their check for $856.37, on the State Street Savings Bank to T. B. Peddie & Co., of New York. It was in-

dorsed by the payees to the plaintiffs, and by the plaintiffs was indorsed to the German-American Bank, New York, for collection, and by that bank in the usual course of business was indorsed to the Bank of Montreal, of Chicago, the defendant, for collection. It belonged to the plaintiff in this case, but the plaintiff having no correspondent or agent in Chicago, employed the German-American Bank to collect it, and that bank employed the defendant, according to usage among banks located at different points. The Bank of Montreal received the check about 11 o'clock on the morning of the 9th of August, and soon thereafter sent it by its messenger to the State Street Savings Bank for payment. The messenger presented it at the counter to the teller, who informed him that the cashier was not then in, and that he could not pay it in his absence. The messenger took the check away, and later in the day called again with it and presented it to the same party, and he made the same reply that the cashier was out, and he could not pay it until he came in. The messenger then asked the teller to certify it, which he did in the usual mode of certifying checks by that institution, and thereupon the messenger took the check away with him. The teller, when he certified the check, charged the amount of it up to the drawer's account, which then exceeded the amount of the check, and credited certificate account with amount of the same. The defendant sent the check for payment on the next day at about 11 o'clock, and it was not paid because the bank had not the funds to pay it. The bank kept its doors open during all of the 10th of August, but had not the funds to pay the check, and failed to open after that day.

Hitchcock & Dupee, for plaintiff.

Dexter & Smith, for defendant.

HOPKINS, J.—The testimony is not very clear as to whether the bank had currency enough on the 9th to pay the check,

if payment had been insisted upon, but as this point is not material in the view I have taken of the law of this case, I shall not stop to settle it; when it was presented after certification it was not paid because the bank was insolvent.

The defendants had the check to collect. It was transmitted to them for that purpose, and their duty as collecting agents was to present and demand payment within the time prescribed by law, and, if not paid, notify the proper parties of its dishonor. If that had been done, the rights and remedies of all parties liable upon it, when it came into their hands, would have remained intact. If loss occurs by the acts or omissions of the party thus assuming the duty of collection, it should fall upon the delinquent agent, not upon the absent owner.

The State Street Savings Bank was not liable to the holder of the check without acceptance. It was liable before acceptance only to the drawers.[1] It could not be made liable to the holder of the check except by its own consent. It had the funds of the drawers, and according to the usual course of dealing with its customers was under obligation to pay on demand all checks drawn upon it by them, but a refusal to do so would not give the holder of the check the right to sue the bank. The drawer in such case would be liable, and he could sue the bank immediately, without redeeming the check, and the bank would be liable for damages for its refusal to perform its undertaking with him as depositor.[2]

This being the law, the duty of the defendant upon receipt of the check for collection was plain. It was to present it for payment, and only for payment. This it did at first, and if it had stopped then there would have been no liability upon it. But it did not; it went farther; it asked for and received the certification of the bank upon the check. By this act a new relation was created between the parties. The amount

1 *Chapman vs. White*, 6 New York, 412.

2 *Merchants' Bank vs. State Bank*, 10 Wallace, 604; *Bank of Republic vs. Millard*, Id. 152.

the check called for was withdrawn from the drawers account and control, and thereafter they had no right of action for it against the bank. The technical operation of the transaction was a transfer to the holder of the check of the drawers funds and right of action against the bank. It superseded the previous rights and obligations of the parties, particularly of the drawers.

Before that, the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification they had no control over the fund or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them any duty in relation to it. It no longer possessed the character of a check. If the drawers had taken it up before its certification it would have been useless, but after that they could only get the money by surrendering it. It resembled after certification, more a certificate of deposit than a check. Now, What was the effect upon the legal rights and liability of the drawers? Did it not discharge them from all further liability upon the check? and if such should be found to be the consequence, Does it not follow that the defendants are liable to the owners for the amount? If they have by their acts released the responsible drawers whereby the instrument is made worthless, Why should they not make good the loss?

In *Smith vs. Millar*, 43 New York, 176, it is said that presenting a check for payment and accepting a certificate as good "is equivalent to payment." In Morse on Banking, p. 282, it is laid down that, if the holder chooses to accept the bank's certification, no matter to suit whose convenience, there can be but one result. The promise of the bank on the drawers account, accepted as satisfactory by the creditor, discharges the debtor, and by the same action deprives him of all further concern in the premises. The bank no longer owes him any duty which he can enforce, or for the breach of which he can sue. If this is the result of the act of the defendant in accepting the certification of the check it would

seem too clear for discussion that the defendant had incurred a liability to pay the amount of it to its principal. The drawers being released by the certification, and the bank being unable to pay, it follows irresistibly that the plaintiff is entitled to recover of the party releasing the drawers, whereby the amount of the check is lost to them.

It was claimed on the part of the defendant on the trial that the plaintiff must show some damages by the act. If the act released a responsible party that would be damage enough. But the law presumes damages from the negligence or unauthorized act of a collecting agent of commercial paper whereby any party to it is released or not charged.[1] And if this presumption is not conclusive, but liable to be overthrown by proof to the contrary, it is the duty of the party at fault to show clearly that no damages did result to the holder of the paper from their negligence, which in this case the defendant did not do. It did not clearly show that the check would not have been paid on the 9th of August if payment had been insisted upon. I think the only safe and maintainable doctrine in this case is that the defendant assumed the risk of payment by the bank when it accepted the certification, and if the bank did not pay, then it must. In laying down this rule I assume that the certificate operated as a release or payment as to the drawers, and that they were no longer liable upon the paper. This release I regard as the pivotal point in this case, and upon that point I am not forced to rely upon my own judgment. I find the precise question has been decided by the Court of Appeals of New York in the case of the *First National Bank of Jersey City vs. Leach*, 52 New York, 350. That was an action on a check drawn by defendant on the 21st of November, 1871, on the Ocean National Bank, payable December 12, 1871. The bank, the plaintiff in that case, discounted it for the payee, and at 11 o'clock a. m. on the 12th day of December, they presented it

1 *Commercial Bank of Albany vs. Hughes*, 17 Wendell, 94.

to the Ocean Bank and got it certified as good. The drawer then had an account there sufficient to pay it, which was on the certification charged up to him on the Ocean Bank books. Within an hour after that, the Ocean Bank suspended. The check was again presented on that day for payment, and was duly protested for non-payment. The bank then sued the drawer to recover the amount of it. The court upon that state of facts held that the plaintiff could not recover; that the certification operated as a payment as between the holder and drawer.

In the opinion it is said "the law will not permit a check, when due, to be then presented and the money left with the bank for the accommodation of the holder without discharging the drawer," that if the holder chooses to have it certified instead of paid, he will do so at the peril of discharging the drawer.

But they say that "this would not discharge the drawer of a check who himself procured it to be certified and then put it in circulation; that the reason of the rule would not apply to him," and conclude the opinion by saying "that upon principle it must be held that the bank holds the money after certification by request of the holder, not at the risk of the drawer, but of the holder of the check."

This is the only direct authority I have found upon this question, from which I judge that the practice of holders of checks getting them certified is not very usual, for if it were, other cases would have found their way into the books and come under judicial consideration.

The defendant on the trial cited *Bickford vs. First National Bank of Chicago*, 42 Illinois, 239, and *Rounds vs. Smith et al.*, *Id*, 245. From an examination of those cases, I do not see that they conflict with the case of *Bank vs. Leach*, 52 New York, *supra*. In those cases the checks were certified at the request of the drawer before delivery. This expressly appears in the last case, and the Judge in his opinion in that says "the case in all its important features is the same as

Bickford vs. Bank," so that I may assume that the checks in in both these cases were certified by request of the drawer, which presents an entirely different question from this, and leaves the point involved here unconsidered in those cases.

In *Brown vs. Leckie et al.*, 43 Illinois, 497, cited by the defendant's counsel, the check was also certified by the request of the drawer before it was passed by him, so that the reasoning of th court in that case was not predicated upon the same facts as appear here. But, as I understand those cases, that court holds that a check operates to transfer the amount named in it to the payee, and authorizes him to sue for and receive it from the bank. If such is the doctrine of that court, I am not at liberty to follow it, for the Supreme Court of the United States, in the *Bank of the Republic vs. Millard*, 10 Wallace, 152, has decided differently. And as the question involved is one relating to commercial securities, and belongs to the domain of general jurisprudence, this Court is not bound by the decision of the state courts where the matters arise.[1] But, waiving this view and difference between the courts on this point, I do not think that the decision of the learned court of Illinois above referred to, when carefully examined, will be found to touch the point involved here. It was not before that court in either of those cases, and, although the general language used might seem to be in conflict with the conclusions I have reached in this case, still when read and considered as used in reference to the facts and question before that court, no conflict or discrepancy of opinion will be found to exist. Those cases are clearly distinguishable on the facts from this case, and are, therefore, not authority upon the point involved here. I am therefore of the opinion that the defendant is liable for the amount of the check, with interest from the certification, as by its certification the drawers were discharged.

A question was suggested as to the right of this plaintiff to

1 *Township of Pine Grove vs. Talcott*, 19 Wallace, 666.

sue the defendant, as it was not its agent, alluding to the recent decision of the Supreme Court of the United States in *Hoover, Assignee, etc., vs. Wise et al.*, 1 Otto, 308 but it was stated, and not disputed, that the plaintiff's attorneys had authority to sue in the name of the German-American Bank as well as in the name of the present plaintiff, the real owner, and that an amendment under the laws of the state was allowable, in the discretion of the Court, by inserting the name of the German-American Bank as plaintiff in lieu of the present plaintiffs, and as the decision making the change necessary has been announced since the commencement of the suit, and as no injury can result, as it appears to the Court, to the defendant thereby, I direct and allow an amendment in that respect by striking out of the process and pleadings the name of the present plaintiff, and inserting in lieu thereof the name of the German-American Bank, and as so amended that judgment be entered for plaintiff and against defendant for $882.76, the amount of the check and interest, with costs of this suit to be taxed.

See *John V. Farwell et al. vs. C. D. Curtis, ante* p. 160.—[Reporter.

CAROLINE M. FORSYTH AND JACOB FORSYTH vs. JOHN SMALE *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1876.

1. BOUNDARY OF LAND BORDERING ON STREAM.—The law upon the subject of land bordering upon streams, is that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of Congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream.

2. NON-NAVIGABLE LAKE.—Is governed by the same principles.

3. LINE AS MEASURED ON STREAM.—Where land is purchased bordering upon a non-navigable stream, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land, the grant includes any land between the meandered line and the water.

Ejectment for land in what is called Lake George, in Lake county, Indiana.

Demurrer to complaint.

Baker, Hord & Hendricks, for plaintiff.

Harrison, Hines & Miller and *McDaid & Knight*, for defendants.

DRUMMOND, J.—Lake George, according to the complaint, is a body of water about two miles long, north and south, and about three-quarters of a mile wide, east and west; its depth is not stated. It is called a non navigable lake, and it is said that for many years after the survey was made by the United States, in 1835, the lake had no outlet. The plaintiffs are owners of the title from the government of two tracts of land on the east side of the lake, called lots No. 3, and 4, being

parts of fractional section 18, in township 37 north, range 9 west, the western boundary of section 18 being most of it in the lake, certainly that part of it immediately west of lots 3 and 4.

Proceeding south on the shore line of the lake, the plaintiffs are owners of parts of section 19, which extend to the southern boundary of the lake; they are also the owners of parts of sections 24 and 13, extending around the lake by its south boundary, and north on its western boundary, so as to include the land immediately opposite lots 3 and 4. The plaintiffs are thus the owners as alleged, of all the land bordering the lake east and west, as well as south, that is to say, south of a line produced west on the northern boundary of lot 3, so as to cross the lake, and it would include all south of that, and on both sides of the lake, as the property of the plaintiffs. The complaint admits that when the survey was made, the lines were run, not upon the water's edge of lots 3 and 4, but they were run in the usual way, for the purpose of ascertaining the quantity of land, and from point to point near the boundary of the lake.

The complaint alleges that the defendants claim that the boundaries did not include whatever land was left west of lots 3 and 4, between the meandered line and the lake. It is insisted, however, on the part of the plaintiffs, that this meandered line was run simply for the purpose of ascertaining the quantity of land, and not to exclude from that quantity the land between the meandered line and the lake.

The complaint produces and makes part of the pleading two plats, copies of the government survey, according to which it appears that the western boundary of lots 3 and 4 was the lake. There is no land shown on the west between the meandered line and the lake, but the lines are run from the eastern boundary of section 18, and of lots 3 and 4 to the lake, and it is admitted, extending the lines thus surveyed and as marked in rods they would not reach the lake; but this is not shown upon the surveys produced in evidence; on

the contrary, as before stated the western line of lots 3 and 4 appears to be the lake. There is no gore or tongue of land represented on lot 3 according to this survey, but the water line is represented to be the ordinary varying line of the lake. The complaint alleges that there is a gore or strip of land extending from lot 3 in a south westerly direction into the lake, and it is in relation to that gore or strip of land that this controversy arises.

Defendants are in possession of that land, and the plaintiffs claim it for the reason as they allege, that whatever land is there is a part of lot 3; at any rate so far as the northern line of lot 3, when produced west, would describe the boundary of that gore or strip of land. The complaint says nothing about the condition of the lake at the time of the survey, whether it is the same now or at the time the suit was brought, as it was at the time of the survey. Whether any changes have taken place in the condition of things does not appear.

The first question to be determined is, whether the boundaries of lots 3 and 4 did extend to the lake, or whether, on the other hand, they did not include more or less of land which might be left between the meandered line and the lake, and, I think, upon the face of the pleadings as they stand when connected with the maps, we must assume that the boundaries extended to the lake.

It seems to me that the principles which are decided by the Supreme Court of the United States in the case of *The Railroad Company vs. Schurmeir*, 7 Wallace, 272, must to a great extent control this case. That was a case where there was a tract of land surveyed on the Mississippi river; a meandered line was run, outside of which was the tract of land in controversy in the case, which was claimed by the railway company, by virtue of a grant from the government to the state of Minnesota, but which was also claimed by the party who had entered the land bounded by the river. That line was run just as this was, with a meandered line upon the

river, and the party purchased the land of the government as so much land, and took his patent for it, and the question was, whether the patent included the land outside of the meandered line, and which was sometimes covered with water and sometimes bare. The Supreme Court held that the patentee had the better right to the land because his patent covered the land in controversy. The meandered lines were run for the purpose of ascertaining the quantity of land, but the intention of the government was to leave the river as the boundary of the land, and the court says: [1]

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line, as actually run on the land, is the boundary.

"Proprietors, bordering on streams not navigable, unless restricted by the terms of the grant, hold to the center of the stream; but the better opinion is, that proprietors of lands bordering upon navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be, and remain public highways. * * * *

"Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words navigable, and not navigable, in that sense, as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow

1. *Railroad Company vs. Schurmeir*, 7 Wallace, 286 to 289.

of the tide, as they were applied to territory situated far above tide waters, and in which there were no salt water streams. Viewed in the light of these considerations, the court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

Now these principles are strictly applicable to this case, and, in accordance with the facts of this case. The only difference is, the court was there speaking of a navigable river, in this case it appears that the lake, so far as we know anything about it, is non-navigable. But why should that, by any possibility, exclude the plaintiffs from the operation of the principle? One would think that, so far from having that effect, it might be brought within the rule of law in relation to non-navigable streams. The law upon the subject of the survey of land bordering upon navigable and upon non-navigable streams is, that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of Congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream, as is stated by the Supreme Court in the case of the *Railway Company vs. Schurmeir, supra.* So that, as to navigable streams, the purchaser takes the land only to the border of the stream, with the right, of course, to make improvements upon the stream, as wharves, just as can be done in water courses where the tide ebbs and flows. This is the case of a non-navigable lake, not of a stream, and the question is, whether that changes the principles of the case as stated. So far as we can judge from the statement made in the pleadings, it seems to me that it cannot. In the argu-

ment of this case a great many facts have been stated of which the court can take no judicial notice. For example, it is stated that the government, in many cases of these non-navigable lakes, has regarded the land covered by the water as still belonging to the government, and has had it surveyed, and has sold it. Some cases in Missouri are referred to and another on the Calumet river, in Illinois and Indiana. We do not undertake to lay down any absolute rule upon the subject. We do not say but that circumstances might change the principle applicable to such a case as this, but if it be true, as we have the right to assume upon the pleadings that it may be, or is, that the physical condition of this lake has not substantially changed between the time of the survey and the time when this suit was commenced, then it seems clear that the plaintiffs, in obtaining the titles to lots 3 and 4 would have the right to include within the boundary of their land, as that which was sold by the government, all of the extension into the lake.

Whether or not this was the effect of a gradual accretion upon the land, or of some sudden cause, all we can judge from is the facts as they appear from the pleadings. As this lake is only three-quarters of a mile wide, it may be doubtful whether the same rule ought to be applicable to this case as to a larger lake, which, owing to the cultivation of the country or other cause, might dry up gradually or suddenly. For example; the plaintiffs being the owners of all the land on the east and west and southern boundaries of this lake, suppose that there is a gradual withdrawal of the lake, and the bed of the lake bordering upon the plaintiff's land should become dry land, What is to prevent the principle of accretion from operating in such a case as this, where the lake is only three-quarters of a mile wide? Ought there to be any difference in this case from that of a non-navigable stream, so called? Is not this within the spirit of the acts of Congress? Whether that would be true of a large body of water

where the water gradually or suddenly retired, it is not necessary to decide. It might be supposed in such case that the government did not intend to convey the land covered by the water, but that perhaps is not necessary to be decided in this case. Neither do I feel inclined to decide absolutely as to the rights of the parties in this case.

It may be that if the facts were all known to us, if the changes which had occurred since the time of the survey and the sale, and the time when this suit was brought were known, we might take a different view of the case. But as far as we can at present see, there seems to be no reason for taking this case out of the general rule, where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land. The uniform rule as to the description of lands in deeds is that the great natural object is to govern, and courses and distances are to yield to the object. The great natural object here was the lake or the water, and the plat shows that the western line of lots 3 and 4 was intended to be the water, and we conclude that the government did not intend to exclude from the operation of the grant which was made to the purchaser, any land between the meandered line and the water, so without actually deciding what may be the ultimate rights of the parties, we must hold that the demurrer is not well taken, and must be overruled.

In re WILLIAM BRUNQUEST.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—JUNE, 1876.

IN BANKRUPTCY.

1. STATUTORY LIEN.—A lien which derives its existence wholly from a state statute, and the continuance of which is by such statute made dependent upon the commencement of a suit in the state court within a prescribed period, is not preserved as a valid living incumbrance upon the bankrupt's estate, when no suit has been commenced in the state court and no step taken in the bankrupt court equivalent to such suit within the time limited by the statute for the preservation and enforcement of the lien.

2. Such a lien, liable to lapse from omission to do an act required to be done for its preservation by the statute creating it, is not kept alive and continuing by virtue alone of the commencement of bankruptcy proceedings.

3. The failure of lien claimants to present their claims or liens for recognition and enforcement to the bankrupt court within the period limited by the statute, bars such claims as effectually as omission to bring suit if the bankrupt were solvent.

Hastings & Greene, for lien claimants.

Joshua Stark, for mortgage creditors.

Vroman & Sale, for assignee.

DYER, J.—Chapter 154 of the laws of Wisconsin for 1862 provides, that any person who may perform any labor or services in running, booming or towing any logs or timber in certain counties in this state, shall have a lien upon such logs or timber for the amount due for such labor and services. The second section of the act provides, that no such demand or claim shall remain a lien on any such logs or timber, unless a petition or statement thereof in writing, under oath, shall be made and filed in the office of the clerk of the Circuit

Court of the proper county, within certain periods named in the statute. Then follows a provision that suit shall be commenced for the recovery and enforcement of such claim or demand, within four months after the filing of such statement or petition. Smith & Butler had a contract with the bankrupt Brunquest, to cut and drive logs owned by him, and they employed certain parties, who are among the lien claimants here, to do the work.

Simpson & Simpson also had a contract with Brunquest for driving logs down the Oconto river and some of its tributaries, and they also employed laborers who are among the lien claimants to do the work under their contract.

Failing to obtain payment from their employers, these claimants are now attempting to assert liens upon the logs which constitute part of the assets of the bankrupt under this statute. The lien claimants employed by Smith & Butler, with the exception of two, filed their petitions for liens within thirty days from the time when their labor and services were completed, but after Brunquest, the bankrupt, and owner of the logs, had filed his petition in bankruptcy, which petition was filed on the 28th of August, 1874. The lien claimants employed by Simpson & Simpson, filed their petitions within the statutory period of thirty days, and before the petition in bankruptcy was filed. Bankruptcy proceedings were commenced in this court before the four months prescribed by the statute, in which to commence a suit for the recovery and enforcement of these claims had expired, and no suits were ever commenced in the state court to enforce these asserted liens, nor within that period did the claimants make proof in this court of any claim upon or against this property; nor did they within that period apply to this court for enforcement of their liens. The assignee of the bankrupt and certain mortgage creditors now contest the validity of these alleged liens, and resist their recognition and enforcement. Their position is that these liens being purely statutory, every requirement of the statute must be complied

with in order to keep them alive and in force; and as there was a failure to commence suit in the state court within the four months named in the statute, or to do that in the bankruptcy proceedings which could be regarded as equivalent to a suit, the liens have lapsed and cannot be recognized.

The position of the lien claimants is, that after adjudication in bankruptcy, it was not only not necessary to bring suits in the state court to enforce their liens, but that they could not properly do so; that these liens were existing and provable at the time the bankruptcy proceedings were commenced, because the work had been done, and the petition had been filed within the time prescribed by the statute; that under the broad language of the first section of the bankrupt act, this court has not only express but exclusive jurisdiction over all liens upon the bankrupt's property, and for their ascertainment and liquidation; that suits brought in the state court after the commencement of bankruptcy proceedings, to enforce the liens, would have been in disregard of the authority of this court, and would not have been tolerated; that by the bankrupt law, liens in existence at the time bankruptcy proceedings are commenced, are preserved without suit, and without any action by lien claimants, in the bankruptcy proceedings, equivalent to a suit; that the bankruptcy proceeding is a suit, though commenced by the bankrupt; that the proceedings throughout constitute but one suit, in which the bankrupt or the assignee is plaintiff, and all creditors and claimants are defendants; that thereby, all the property of the bankrupt is taken and held as a trust fund for the benefit of all creditors and lien claimants; that the provisions of the bankrupt law are designed to protect all such claimants, whether they hold their liens as security for a personal debt of the bankrupt or not; and that finally, the commencement of proceedings in bankruptcy, being the commencement of a suit to which all lien holders are parties, and as thereby a trust fund is created for their benefit, without any application to the bankrupt court to enforce the liens within the

statutory period of limitation, the liens must be recognized throughout the entire bankruptcy proceedings, as they stood at the time the petition in bankruptcy was filed.

It is to be first noticed, that none of these lien claimants are the personal creditors of the bankrupt; they were employed by and performed work for other parties who are their personal debtors; they are now asserting claims upon the bankrupt's property, upon which they performed the work, and which claims could have had no existence but for the provisions of a state statute. It is said that these claims could not be recovered or enforced by actions in the state court, as this statute provides; that if the claimants had resorted to such remedy before the bankruptcy proceeding was commenced, that proceeding would have arrested such suits, and if taken subsequently to the filing of the petition, the proceeding would have been in contempt of the authority of the bankrupt court.

There are decisions in which the exclusive jurisdiction of the bankrupt court over liens upon the property of the bankrupt has been so strongly asserted, as to furnish some support to the proposition thus laid down by counsel for the lien claimants. *In re Cook and Gleason*, 3 Bissell, 116, was a case where petitions were filed for the purpose of perfecting mechanics' liens in conformity with the state law, after bankruptcy proceedings were begun. Suits were then commenced against the bankrupts and the assignee in bankruptcy, to enforce the liens in the state courts. The District Court for the Western District of this state, upon the application of the assignee, stayed the suits and directed the property to be sold free of all liens of that character, and the proceeds to be paid into court.

Judge HOPKINS in his opinion says, in relation to the right of parties thus situated to bring their actions in the state court after bankruptcy proceedings commenced, for the purpose of asserting and enforcing such liens, that the bankrupt act provides for the protection of legal liens against the bankrupt's

property, instead of destroying them, and that where a party has a lien, when the petition in bankruptcy is filed, but according to the requirements of the statute in order to continue it beyond a certain period, it is necessary to file a petition in the clerk's office, such party having first obtained leave from the bankrupt court, would have the right to file such petition, and thereby continue the lien, or if he does not file the petition in the clerk's office, but asks to have his rights established in the bankrupt court, that court should hold that as against property in the hands of an assignee in bankruptcy, it would not be necessary to file the petition in the state court to continue it. He holds also that the proceedings in that case having been commenced in the state court after the filing of the petition in bankruptcy, the parties by so doing were guilty of contempt of the authority of the court in which the bankruptcy proceedings was pending. It will be however, observed, that he says further, that a party having a claim, lien, or interest in the property in the hands of an assignee in bankruptcy, should apply to the bankrupt court for relief, and that court might grant the relief asked, or allow a suit to be brought even in the state court, to determine the same. This case is much relied upon by the lien claimants here as authority for the broad proposition that no proceeding could be taken in the state court after the filing of the petition in bankruptcy to enforce these alleged liens. I do not think the case goes to that extent. The Supreme Court of the United States in *Eyster vs. Gaff*, 91 United States Reports, 521, have held, that where the foreclosure of a mortgage was begun in the state court before the bankruptcy proceedings were commenced, the state court having jurisdiction of the subject matter, and having acquired jurisdiction of the parties, has the right, notwithstanding the commencement of the bankruptcy proceedings, to go on with the foreclosure, and they hold that the jurisdiction of the bankrupt court, although very broad and comprehensive upon the question of liens on the bank-

rupt's property, is not under all circumstances absolutely exclusive, especially in a case where a proceeding has been taken in a state court to enforce the lien, before the commencement of proceedings in bankruptcy.

Justice MILLER in his opinion says, that it was the duty of the state court in that case to proceed to a decree as between the parties before it. "The court had acquired jurisdiction "of the parties and of the subject matter of the suit. It was "competent to administer full justice, and was proceeding "according to the law which governed such a suit, to do so. "It could not take judicial notice of the proceedings in bank- "ruptcy in another court, however seriously they might have "affected the rights of parties to the suit already pend- "ing. * * * * * * * * * * * * * * * * "The opinion seems to have been quite prevalent in many "quarters at one time, that the moment a man is declared "bankrupt, the District Court which has so adjudged, draws "to itself by that act, not only all control of the bankrupt's "property, and credits, but that no one can litigate with the "assignee, contested rights in any other court, except in so "far as the Circuit Courts have concurrent jurisdiction; and "that other courts can proceed no further in suits of which "they had at that time full cognizance. * * * The "debtor of a bankrupt, or the man who contests the right to "real or personal property with him, loses none of those "rights by the bankruptcy of his adversary. The same "courts remain open to him in such contests, and the statute "has not divested those courts of jurisdiction in such actions. "If it has for certain classes of actions conferred a jurisdic- "tion for the benefit of the assignee, in the Circuit and "District Courts of the United States, it is concurrent with "and does not divest that of the state courts."

The effect of this decision is to practically overrule a number of decisions of the District Courts of the United States, upon the question of jurisdiction as affecting the enforcement of liens. From the doctrine of this decision it

follows that if suits had been commenced in the state court before the petition in bankruptcy was filed in this case, for the purpose of enforcing these liens under the state statute, the prosecution of such suits would not have been necessarily arrested by the commencement of bankruptcy proceedings. It might be, that under special circumstances, the bankrupt court would enquire into such proceedings and perhaps stay the parties who were prosecuting them, for the purpose of bringing them into this court, and here, rather than in the state court, settling the question as to the validity of these liens. However this may be, certainly after the bankruptcy proceeding was commenced, upon being advised that in order to preserve, keep alive and enforce these alleged liens, it was necessary that the parties should commence actions or take legal proceedings within a limited period, this court could, and assuredly would, have granted leave to the parties, either to have commenced actions as the state statute provides, or to make application to this court for the recognition, preservation and enforcement of their liens. In other words, this court could have authorized and sanctioned such a proceeding as would have been equivalent to the commencement of an action in the state court, for the enforcement of the liens. And the question here is, whether for preservation and enforcement of these liens, some step equivalent to suit, should not have been taken by the lien claimants within the period fixed by the law creating the lien. It is true, that the language of the first section of the bankrupt law, upon the subject of jurisdiction and of the ascertainment and liquidation of liens, is very comprehensive. The question however, is, of what liens does this section speak. Here we have the case of liens deriving their existence purely and solely from a statute of the state, which provides, that unless certain acts are done by the parties within certain limited periods, their liens shall be suspended or shall lapse. Now, does the ascertainment and liquidation of liens, as contemplated by the bankrupt law, necessarily imply the absolute preservation of

such statutory liens, in the absence of acts on the part of the lien claimants such as the statute prescribes, and that, too, when the continued existence of the liens is, by the statute creating them, made dependent upon such acts of the party asserting the liens?

The argument of counsel for these lien claimants is complete as addressed to the general power of the bankrupt court, over the property of the bankrupt, and as to not only the power but the duty of that court to recognize and enforce in the administration of the estate, all liens valid in their inception and continuing in their life. But it does not follow that the bankrupt law of its own vigor preserves the life of a lien which is created solely by state statute, when there are wanting such acts of the party as the statute requires to be done as a condition to the continued existence of the lien.

It may be admitted that the commencement of bankruptcy proceedings is in a certain sense the commencement of a suit to which all the creditors of the bankrupt, secured and unsecured, and all lien holders, are parties, and that there is involved in the proceeding, the creation of a trust for their benefit; that the property is then *in custodia legis*, and that the rights of all lien claimants, as well as those of general creditors, should be respected.

The question still remains, is a lien which derives its existence wholly from state statute, and the continuance of which is by such statute made dependent upon the commencement of a suit within a prescribed period, preserved as a valid living incumbrance upon the bankrupt's property, when no suit has been commenced in the state court, and no step taken in the bankruptcy court equivalent to such suit, within the time limited by the statute for the preservation and enforcement of the lien?

Authorities are cited, and they are numerous, in support of the general proposition laid down by claimants counsel, relative to the powers of the District Court in the enforcement of liens. Among them is the case of *Samson, Assignee*,

vs. Clark & Burton, 6 Bankruptcy Register, 403, in which Judge WOODRUFF, in speaking of the first section of the bankrupt law says, "that language more comprehensive can "hardly be suggested, than is employed in the act giving "power to collect all the assets, to ascertain and liquidate the "liens and other specific claims thereon, adjust the various "priorities, and marshal and dispose of the different funds "and assets, so as to secure the rights of all parties. The "entire estate is brought within the reach of these compre- "hensive powers, by vesting it in the assignee appointed by "the court to administer it under the direction of the court. "Nor can it make any difference with the power of the court "over this subject, that the lien, or alleged lien, is inchoate and "incapable of execution, until the amount secured thereby "is ascertained and settled; ascertainment and liquidation "are expressly authorized, and the subsequent provisions of "the act relating to creditors having mortgages, liens and "other security, show how fully the whole administration of "the estate is confided to the court."

Now if these lien claimants had in addition to filing their petitions, as the statute creating the liens required, commenced suits, or done that in this court which would be equivalent to suits for the enforcement and to prevent a lapse of such liens, so that they could be regarded as standing in the position of mortgagees or lien claimants, having subsisting, liens upon the property, then this language of Judge WOODRUFF would forcibly apply, and within the powers conferred upon the bankrupt court, these liens could be recognized, the amount thereof ascertained and liquidated, and the whole question as between these lien claimants and the bankrupt, and the creditors of the bankrupt could be fully adjusted. The opinion of Judge LONGYEAR in the case of *Phelps vs. Sellick*, 8 Bankruptcy Register, 390, embodies in a series of propositions, a very complete summary of the powers of the bankrupt court in the adjustment and enforcement of liens, and covers the whole question as to both

secured and unsecured creditors. They are propositions that would embrace the question we have here, completely, if these lien claimants had done that which I think it essential that they should have done for the purpose of keeping their liens in existence.

The case of *Eldridge & Co.*, 12 Bankruptcy Register, 540, is also a case relied upon by the counsel for the lien claimants. Admit the full force of these authorities, still it does not necessarily follow that a lien liable to lapse from omission to do an act required to be done for its preservation by the statute creating it, is kept alive and continuing, by virtue alone of the commencement of the bankruptcy proceedings.

The fallacy of the position taken by the lien claimants, in part at least, lies here—that because the bankrupt act confers upon the bankrupt court extensive and even ample jurisdiction over the assets of the bankrupt, and all liens thereon, and because the bankrupt's property is made a trust fund to be applied in satisfaction of all such demands, claims and liens, therefore a statutory lien which is made dependent for its existence upon the conditions of the statute creating it, is preserved by virtue of the bankrupt law and of the commencement of bankruptcy proceedings—though those conditions or their equivalent be not complied with. I think there can be no doubt that these lien claimants could as an equivalent for commencing suits in the state court, have asserted or proved their liens in the bankruptcy proceedings, within the time limited by the statute creating the liens, but this was not done.

To preserve a statutory lien dependent for its continued existence upon observance of the terms of the statute, those terms must be complied with by performance of the required act or its equivalent. The assignee, it is true, takes the property of the bankrupt subject to all liens thereon, but they must be kept valid and living liens.

As counsel for the mortgage creditors has argued, the

right of action in the federal court for the enforcement of these alleged liens, is subject to the limitations as to time, placed upon it by the statute creating the liens, and all lien creditors and claimants must, within the statutory period, assert their claims, and have them adjusted.

This statute requires affirmative action on the part of the claimants in order to preserve their liens, and the filing of a petition in bankruptcy by the debtor, was not the commencement of a suit for the enforcement of these alleged liens, within the meaning of the law.

The doctrine of trust, contended for here, accurately speaking, applies to creditors of the bankrupt who have provable debts against him; they hold debts which the bankrupt is under a legal and personal obligation to pay, and for the payment of which his estate is devoted, thereby creating a trust. But here, the bankrupt is not the debtor of these claimants. The claimants are in no sense his creditors; they have no interest in the general assets of the bankrupt; their claims are upon certain property, and such as can only be enforced on application within a prescribed period.

The creditors of a bankrupt are parties to the bankruptcy proceedings. In the first instance, they may petition for adjudication; they have a direct interest in the management of the estate, and must have notice of proceedings; they may control dividends and compositions. But the position of these lien claimants essentially differs from that of either secured or unsecured creditors of the bankrupt; they cannot institute bankruptcy proceedings against the person upon whose property they assert liens; they have no right to vote in the choice of an assignee, nor can they unite in the meetings of creditors; they cannot surrender their liens and become general creditors of the bankrupt; they hold merely a lien, which is the creature of a statute containing provisions, upon a compliance with which the continued existence of the lien is dependent.

Suppose that after the filing of the petition in bankruptcy

in this case, and while the four months limitation provided by this statute for the commencement of suits for the enforcement of the liens was running, the bankruptcy proceedings had been dismissed; what then would have been the position of these lien claimants? Or, suppose that composition proceedings had been taken, and the case had passed out of this court upon composition settlement; what then would have become of these asserted liens? In the case of *Davis vs. Anderson*, 6 Bankruptcy Register, 162, the court says: "The assignee may cite in the secured creditor, so as to "determine what shall be done with respect to the security, "and it may be advisable so to do, yet it is none the less the "duty of the secured creditor to prove his demand, and "obtain the aid of the court for its enforcement. If the "lien creditor does not act, and the property is sold by the "assignee under the order of the court, free from all liens "and incumbrances, What recourse is left to the creditor after "the fund has been fully distributed? If he thus sleeps on "his rights, he does so at his peril."

Now if this be true as a proposition applicable to a secured creditor of the bankrupt, does it not with equal and even superior force, apply to a party who is not a personal creditor of the bankrupt at all, but who is asserting a lien upon the bankrupt's property by virtue alone of a statute creating such lien.

The decision of the Supreme Court of this state in *Bryant vs. Small*, 35 Wisconsin, 206, bears upon the case at bar. That was a proceeding under the statute of Wisconsin, to enforce a mechanic's lien. The labor was performed and materials furnished between the 12th of November, 1872, and the 13th of March, 1873. The petition for the lien was filed on the 2d of May, 1873, and the action was instituted within the time prescribed by the statute. The owner of the building was adjudicated a bankrupt on the 15th of March, 1873. That was two days after the completion of the work, and before either the petition for the lien was filed, or suit was

commenced. The suit to enforce the lien was commenced, it will be noticed, after the proceedings in bankruptcy were begun. "The defendants failed to answer, and the plaintiffs "moved for judgment on the complaint. This was objected "to by the defendants, on the ground that upon the allega- "tions of the complaint, it appeared that the bankrupt court "had exclusive jurisdiction of the lien proceedings, and the "Circuit Court denied the motion for judgment, and dis- "missed the complaint for want of jurisdiction." An appeal was taken to the Supreme Court, and that court reversed the judgment of the court below. It was claimed by the defendants in that case, that the plaintiff had a full and complete remedy in the District Court of the United States under the provisions of the bankrupt law, for the protection and enforcement of his lien, and that he should apply to that court for relief. The court says that it is possible that the lien would be enforced in the District Court without any petition being filed or suit instituted in the state court, to preserve and continue it; but that it could not be assumed that such would be the construction of the bankrupt law, and that the District Court might hold that the petition must be filed and the suit commenced in the state court within the time fixed by the statute, in order to continue and enforce the lien. The court in their opinion used this language, "There is certainly much "reason for saying that the petition must be filed and action "instituted in the proper court within the time limited, in "order to preserve the lien, whether it is ultimately enforced "in the state or federal court. At all events, we cannot see "that it will likely lead to any embarrassment or conflict of "jurisdiction, for the Circuit Court to retain the cause until "the bankrupt court has acted upon the subject. This was "the course pursued in *Clifton vs. Foster*, 103 Massachusetts, "233, and we can perceive no objection to the practice."

Following these views, the court ordered the action brought in the state court to enforce the lien, stayed, to await

the action of the District Court in the bankruptcy proceedings.

This is at least a recognition of the necessity for some action on the part of one claiming a lien under a state statute, in the shape of a legal proceeding for the enforcement of such lien, and of the necessity that such proceeding be instituted within the statutory period.

In the case of the *Firemen's Insurance Co.*, 3 Bissell, 462, the facts were that a policy of insurance contained the usual provision that no suit or action against the company for the recovery of any claim by virtue of the policy, should be sustainable in any court of law or chancery, unless such suit or action should be commenced within twelve months next after the loss should occur. The insurance company was placed in bankruptcy. The insured had sustained a loss, but neither commenced an action in the state court to recover the amount of his loss, nor did he make any proof of his claim against the company in the bankrupt court, within twelve months after his loss occurred; and the question was, whether he could after the expiration of that period prove his claim in the bankrupt court and participate in the dividends.

The Court—Judge BLODGETT, held "that if the loss had "been duly and regularly adjusted in good faith before the "company was adjudicated a bankrupt, the claim could be "proved like any other debt without regard to the year "clause of the policy; but if the proofs of debt were not sub-"mitted or acted upon until after the petition was filed in "bankruptcy, I think, that while the assignee may examine "and pass upon such proofs for certain purposes, he cannot "make an adjustment or agreement to pay, upon which an "action could be maintained, and the assured, in order to "preserve his claim, must not only present his proofs under "the ninth clause, but must also make his proof in bank-"ruptcy, as the substitute or equivalent for the commence-"ment of a suit within twelve months under the twelfth

"clause." And he concludes that failure or neglect to make such proof, or bring suit within the time limited, bars the claim as effectually as failure to sue, if the company were solvent. So in analogy to the principle here stated, the failure of these lien claimants to present their claims or liens for recognition and enforcement to the bankrupt court, within the period limited by the statute, bars such claims as effectually as omission to bring suit if the bankrupt were solvent.

My conclusion is, that because of this failure either to commence a suit in the state court for the enforcement of these demands, within four months after the filing of petitions, or to do that in this Court which would be equivalent to the commencement of such suits, namely, to present the claims to this Court in these bankruptcy proceedings, within the four months, for recognition and enforcement, these liens must be said to have lapsed, and cannot now be recognized.

The exceptions of the assignee and of the mortgage creditors, to the commissioner's report allowing these claims as liens upon the property in question, will be sustained.

On review, the foregoing decision was affirmed by Judge DRUMMOND.

William H. Dunham vs. The Indianapolis & St. Louis Railroad Company.

Circuit Court.—Northern District of Illinois.—June, 1876.

1. Patent.—Rights of Licensee from one of Several Owners.—A license by one patentee to use the thing patented, clothes the licensee with the right to use it, and he becomes liable for the contract price for the license.

2. Patentees are tenants in common of the right.

Banning & Banning, for plaintiff.

Baldwin & Hanna, for defendant.

Drummond, J.—The facts in this case are, that three persons were patentees for an improvement in car-brake shoes, and that the plaintiff, being one of them, made a contract with the defendant for a license to use the invention described in the patent; the price to be paid for the license was a thousand dollars. The plaintiff executed and offered to deliver to the defendant the license signed by himself, but not by the two other patentees, and the defendant refused to comply with the terms of the contract and pay the money, because the license was not signed by all of the patentees. The patentees did not own the right in equal shares; one of them owned a half, and the other two a quarter each, the plaintiff only owning a quarter; and the question in the case is, whether this constitutes a good defense to a suit brought upon the contract made between the plaintiff and the defendant; and I am of opinion that it does not. The material point is, who is to answer, if any one, to the other patentees for the use of the part which does not belong to them when a joint owner uses the improve-

ment, or makes a contract with another person for its use. What is the position of patentees with reference to their right to use the thing patented? The patentees are tenants in common of the right. One of them has no superiority of right over the other. One of them can manufacture and use the article patented without the consent of the others; that is, each has the same right, although one may own a greater share of the thing patented than the other. The grant was, in this case, to the three to use and vend the improved car-brake shoes, and while it is clear that one of the patentees can not grant what does not belong to him, and if he gives a license or makes a contract for the use of the thing patented, he can only grant that which he has himself, and not the rights of the other patentees, still he can clothe his grantee or his licensee with the same right that he has himself, namely, the right to sell or use the thing patented. And it seems to me the better rule is to hold, if there is a liability at all, that where a party owning less than the whole of a thing patented, makes a grant or a license, he shall be answerable to the others, rather than that the other patentees shall look to the grantee or licensee.

There were three cases particularly referred to on the argument. One was the case of *Pitts vs. Hall*, 3 Blatchford, 201—decided by Judge HALL, of the Northern District of New York. He seems to hold that if one joint owner of a patent uses or sells his right without the authority of his co-owner, he is liable to an action by such co-owner for an infringement of the patent; and the conclusion, perhaps, to be drawn from his decision is, that if the party to whom he sells uses the thing patented, an action could be maintained and an injunction issued against the grantee or licensee of the co-owner.

Judge CURTIS, in the case of *Clum vs. Brewer*, 2 Curtis, Circuit Court, 506, seems to hold, and I think that is the true rule upon the subject, that where one of the joint patentees uses or sells the thing patented, or any portion of it, the

others can not sue him as for an infringement of the patent. The most that can be claimed is, that if one uses or sells it to the detriment of the others, he may be held responsible. For example, if he obtains more than his share of the profits from the use of the article, or in issuing licenses he obtains more than his share of the license money, he possibly may be held responsible by the other joint patentees; but Judge CURTIS, in that case, held that an injunction should not issue against the use, by one of the joint patentees, of the thing patented, and the principle decided by him is, that one tenant in common of letters patent has the same rights as the others to make, use and sell the thing patented, and a licensee under one tenant in common cannot be enjoined on a bill by another tenant in common.

A case has been decided in England bearing on this question, *Mathers vs. Green*, 1 Law Reports, Chancery Appeals, 29, and the opinion is given by Lord Chancellor CRANWORTH. That was a case of letters patent granted to three individuals. The Chancellor says:

"The right conferred is a right to exclude all the world, other than the grantees, from using the invention. But there is no exclusion in the letters patent of any one of the patentees. The inability of any one of the patentees to use the invention, if any such inability exists, must be sought elsewhere than in the letters patent. But there is no principle, in the absence of contract, which can prevent any persons not prohibited by statute, from using any invention whatever. Is there any implied contract where two or more persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or, if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else to compel the other patentee to risk his skill and capital in the use of the invention on the terms of being accountable for half the profit, if profit should

be made, without being able to call on his co-patentee for contribution if there should be loss."

Now while this is the principle announced by the Chancellor, it perhaps should be with this qualification: that if one of the patentees obtains more than his share of the profits, he might be held liable under certain circumstances to the others. Certainly I do not wish to be understood as affirming that there is never such liability. Of course we must take into consideration any risk which he may run; any outlay of money which he may make in the manufacture or sale of the article; but if, looking at it upon equitable principles, he has obtained more than his share of the profits arising from the thing patented, either in the use or sale of it, or of licenses, it seems to me he might in certain cases be held accountable to the other joint patentees. But it is not necessary in this case to decide that point. My conclusion therefore is, that the fact that one of the patentees has given a license to the defendant to use the thing patented, clothes him with the right to use it, and having that right, he is liable under his contract for the payment of the one thousand dollars which he agreed to pay for the license.

Judgment will accordingly be entered for the plaintiff.

STATE OF INDIANA *ex rel* vs. THE AMERICAN EXPRESS COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JUNE, 1876.

1. STATE TAX ON INTER-STATE TRANSPORTATION.—The penalties against a foreign corporation prescribed by the seventh section of the Indiana statute of 21st December, 1872, for omitting to make return of its receipts for transportation through the state cannot be enforced.

2. A tax by a state upon transportation through the state is an interference with inter-state commerce, which it is not competent for a state to restrict.

Claypool, Mitchell & Ketchum, for State of Indiana.

Baker, Hord & Hendricks, for American Express Company.

DRUMMOND, J.—On the 8th of March, 1873, the legislature of Indiana passed an act amendatory of "An act to provide "for the uniform assessment of property, and for the collec- "tion and return of taxes thereon; approved December 21, "1872."

By the sixth section of this act, it was made the duty of every corporation, whether foreign or domestic, engaged in the business of transporting or carrying passengers or freight on any railroads in the state, by virtue of any contract or agreement with the railroads, to make returns in the months of January and July in each year to the auditor of state of the gross amount of all receipts received in the state for the transportation of passengers or freight for the six months preceding, and it was required of the company that at the time the report was made there should be paid into the treasury the sum of $1.00 on every $100 of receipts received for transporting freight.

There was a proviso attached to this section, which declares that when the amounts received by the corporation, whether received within or without the state, and when a part of such receipts were on account of fare or transportation over roads within the state, there should be included as a part of the report such proportion of the amount of the receipts as the distance traversed in the state bears to the whole distance paid for.

The seventh section of this amendatory act imposes the penalty of $100 per day for every day's delay in which there should be a failure after thirty days, to render an accurate account of the receipts as provided in the foregoing section.

It is for a violation of this sixth section of the amendatory act, and to enforce the penalty of the seventh section that this action is brought. The complaint sets forth the facts; that the defendant, the American Express Company, is a company chartered by the legislature of another state; that it transacts business in this state, and perhaps it is a fair inference from all the circumstances of the case that it is one of those foreign corporations which is authorized to transact business under the laws of this state within the limits of the state.

To the declaration, or complaint, the answer sets forth the facts connected with the mode in which the defendant transacts business; being a corporation of another state, it receives merchandise out of the state, transports it into the state, receives merchandise in the state and transports it out of the state; and also receives and delivers merchandise transported on railroads in the state; that by virtue of an arrangement with railroad companies it sends its own agents on the cars, a certain space being given to the agent for the accommodation of the packages of the express company; that it takes to the railroad cars and receives from them and delivers the packages with its own horses and wagons, and its own servants and agents, and that all this business is so mingled together that it is impossible to separate what may be considered the receipts

growing out of the one or the other; and that there is an amount charged for the whole of the business done, as well for the delivery of the goods on board of the cars as their delivery to the consignee. It is also insisted on the part of the defense that a large proportion of the receipts consists of money received out of the state for the transportation of merchandise received out the state and carried through the state to other states.

To these defenses there is a demurrer, and the demurrer, if there is a defect in the declaration, or if the suit cannot be maintained, can of course be carried back to the complaint. And I think that upon carrying the demurrer back to the complaint the result is that the action cannot be maintained.

Without deciding whether the 6th section of the amendatory act referred to applies to an express company, but conceding that it does, which I am rather inclined to think is the fact—and without deciding whether the subject matter of the amendatory act is sufficiently set forth in the title as required by the constitution of the state, about which I think there may be great doubt, but conceding for the purpose of the argument that the act is valid in that respect, still I think that the penalty cannot be enforced; and for this reason:

The 6th section of the amendatory act, it will be observed, imposes certain duties upon all foreign or domestic corporations, and requires that they shall make returns of their gross receipts received in the State of Indiana, but there is to be included in and as constituting a part of the returns, all receipts, whether received within or without the state, and whether the goods are transported entirely through the state without being landed, or whether received from other states and delivered within the state, or received in the state and delivered in other states.

Now what is the law in case there is a failure to comply with the provisions contained in the 6th section? It is that if the party does not within thirty days render an accurate

account of the receipts as herein provided; if there shall be a failure in any particular to render an account as required, there is a penalty to be enforced; so that it must appear, I think, that the state had the right to require everything to be done as specified in the sixth section before the penalty named in the seventh becomes operative. So that if it shall appear that the state has not the right in any one or more particulars to demand of this defendant the returns to be made as therein required, then the penalty is not enforceable.

I think the state has not that right. In the first place this is a foreign corporation; and conceding, as I am inclined to do, that the state would have the right to say to a foreign corporation doing business in this state under law that there should be levied and paid a tax upon its gross receipts received in the state whether for transportation of property or merchandise outside of the state or through the state; and conceding also that the rule laid down in 15 Wallace, 284, in "*The State Tax on Railway Gross Receipts*" is applicable to a foreign corporation doing business within the state, still it is clear, I think, that it is not competent for a state to require of a foreign corporation the payment of a tax on gross receipts not received in the state. And it is certain that it is not competent for a state to impose a tax upon the receipts of a foreign corporation for the transportation of merchandise received out of the state and delivered out of the state and simply carried through the state. That is what this law requires, and it is an interference on the part of the state with that which solely belongs to Congress; namely, it affects inter-state commerce, which the Supreme Court of the United States in the case in 15 Wallace above cited, decided could not be done; and it is obvious that if it could be, it would be competent for a state to restrict in such measure as it seemed proper the transportation of merchandise which simply might pass through its territory. It would be therefore a tax upon inter-state commerce. This clearly cannot be done. This is what this statute attempts to do. The

state says to the corporation that unless it will make this return, which under the Constitution it is not required to do, the penalty shall be imposed. The answer is, I think, on the part of the corporation that a requisition is made which the state has no right to make, therefore it can protect itself under the constitutional prohibition against the right of a state to interfere with inter-state commerce.

For these reasons the demurrer must be carried back and sustained to the complaint.

In re LEWIS LEVIN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1876.

IN BANKRUPTCY.

[1] 1. CONSTRUCTION OF RULE 24.—The District Court has discretion to enlarge the time for entering appearance and filing specifications in opposition to discharge as well after, as before the expiration of the time allowed by the rule.

On February 16, 1876, the bankrupt filed his petition for discharge. March 25 following was assigned for the hearing of the petition, and no opposition being on file the case was referred to the Register to report as to the regularity of the proceedings. On the same day the bankrupt made his final oath before the Register according to the statute. On April 3, William A. Hubbard, a creditor, who had duly proved his claim, entered his appearance in opposition to the discharge of the bankrupt, and on April 6 the bankrupt moved to strike the appearance from the files. On the same day Hub-

bard asked leave to file his specifications in opposition to the discharge. To this the bankrupt objected on the ground that the appearance and specifications were not filed in time, under the twenty-fourth rule in bankruptcy. The District Court, however, overruled the motion of the bankrupt, and allowed Hubbard to file specifications in opposition to the discharge within four days. The bankrupt thereupon filed a petition of review in the Circuit Court.

Becker & Dale, for objectors.

Shorey & Shaffner, for bankrupt.

DRUMMOND, J.—The 24th rule in bankruptcy requires that any creditor opposing the discharge of the bankrupt shall enter his appearance in opposition thereto, on the day when the creditors are required to show cause; and shall file his specification of the ground of opposition in writing within ten days thereafter, unless the time shall be enlarged by the District Court. More than ten days had elapsed from the 25th day of March before Hubbard asked leave to file specifications, and his appearance had not been entered on that day, as strictly speaking it should have been.

It was claimed on the part of the bankrupt that the rule is absolute in its terms, and that if ten days had elapsed before the filing of specifications or before application had been made for an enlargement of the time, the power of the District Court to exercise the discretion therein referred to had ceased to exist; and such is claimed to be the opinion of the court in some cases cited. But this is too narrow a construction of the rule. The District Court had the discretion to enlarge the time as well after the expiration of the time as before. In equity, when a discretion is given to the court, it has been uniformly exercised as well after as before the time designated, and in the present case there was no reason why this rule should not be followed. The demurrer to the petition is sustained, and the order of the District Court affirmed.

In re ANDERSON.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—JULY, 1876,

1. GUARANTY—DOES NOT MAKE SECURED DEBT.—A guaranty is not such a security under the meaning of the Bankrupt Law that the creditor must surrender it to the assignee if he desires to prove his debt in full, and such creditor has the right to prove such debt as an unsecured one.

The bankrupt, in order to obtain credit from the firm of Richards, Shaw & Winslow, procured John Servis to guarantee the payment of goods purchased of them by him to an amount not exceeding two thousand dollars, whereupon credit was extended to him by said firm to the sum of about three thousand dollars, and he was indebted to them to about that amount for goods sold, when he was adjudicated bankrupt, two thousand of which was secured by the guaranty of Servis as hereinbefore mentioned.

After the bankruptcy, the said firm made and filed with the register, Hon. C. Graham, proof of the whole claim as unsecured. The proof contained the usual allegations of no payments or security except the guarantee as aforesaid.

The assignee and some of the other creditors objected to the allowance of the whole as an unsecured claim against the bankrupt, contending that to the extent of the amount guaranteed it should be treated as a secured debt and proven as such. Thereupon, the Register, at the request of the attorneys of the respective parties, submitted and certified to this court the question "whether said claim should be allowed in gross as proven, or whether it should be allowed and proven in two separate items, one for two thousand dollars as secured, and one for one thousand and sixty-three dollars and forty

cents, being the balance of the account, as unsecured."

Cameron & Losey, for assignee.

Wing & Prentiss, for creditors.

HOPKINS, J.—The counsel for the assignee has submitted an argument to me, in which it is insisted that the account to the extent of the amount guaranteed is a secured debt and should be proven as such. It is not denied but that the bankrupt was indebted to these creditors for goods sold him in the amount stated in the proof. The only question, therefore, is one of law, that is, whether this debt, to the extent of the guaranty of Servis, who is good, and responsible for the amount of it, is to be regarded as a secured debt within the meaning of the bankrupt law.

This depends uopn the proper interpretation of Section 5075, Revised Statutes. That section reads: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, to secure the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt due after deducting the value of such property. * * * * * * * * * * Or the creditor may release or convey his claim to the assignee upon such property and be admitted to prove his debt. * * * * * * * * * * * * * * * * * If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

This is the provision in regard to proving secured debts, and it so clearly defines the kind of security meant, it seems to me that there can be but little doubt that a debt secured by the guaranty or indorsement of a third person does not fall within the purview of the acts. The security must be upon property real or personal of the bankrupt, that may be surrendered or conveyed to the assignee, and the estate in his hands be augmented thereby. It, in terms, applies only to

security of property upon bankrupt. It has been held both in this country and England (where the statute is similar to ours) that when a debt of the bankrupt is secured by the guaranty or indorsement of a third party and such third party has secured the debt by mortgage on his own property, that such a case was neither within the spirit or meaning of the act. A creditor holding such a security could not by a release or surrender use it for the benefit of the bankrupt's estate. In the assignee's hands it would be wholly unavailing. It has also been held that a creditor holding security upon the separate estate of the wife of the bankrupt for his debt is not a secured creditor within the act, and may prove his debt as unsecured.[1] The rule is stated that a creditor has a right in bankruptcy to prove and avail himself of all collateral securities from third persons to the full extent of the debt. Section 6075, in harmony with this conclusion, provides that when a party is liable upon a note or contract as a member of two firms having distinct estates to be wound up in bankruptcy, the debt may be proved as against both. See also in further elucidation and support of this view, *Ex parte Goodman*, 3 Maddock's Chancery, 373; *In re Plummer*, 1 Phillips, 56; *Peacock's case*, 2 Glyn & Jameson, 27; *Ex parte Adams*, 3 Montague & Ayrton, 157. The English authorities on this point were examined and approved by Justice STORY, *In re Babcock*, 3 Story, 393. That was the case of an accommodation acceptor of a bill of exchange going into bankruptcy, and the holder of the bill having attached certain property of the drawer, and having also proved his debt against the acceptor's estate. Judge STORY said: "Admitting the attachment to be a security and the bankrupt to be an accommodation acceptor, it is clear that the creditor has a right to proceed against the bankrupt for his debt in bankruptcy, and also against the other parties to the bill under his

1 *Ex parte Hedderly*, 2 Montague, Deacon & De Gex, 487; *Ex parte Parr.*, 18 Vesey, 65.

attachment until he has recovered the full amount of his debt, for it is not a security given by the bankrupt of his own property."

That case was like this in some respects, for it seems that creditors had a suit pending, when the adjudication was had, against Servis, their guarantor, in which I learn from the counsel's argument, they had attached property of the guarantor. In *In re Crane*, 1 Bankruptcy Register, 132, this question is very fully considered, and the same conclusion reached as I have arrived at in this case. Further support of this interpretation is found in § 5070, which authorizes indorsers or guarantors of bankrupts to prove such debt when not paid, in case the creditor holding them fails to make proof thereof, and thus obtain the benefit of all dividends in reduction of their liability.

That class of persons are within the protection of the bankrupt act—are regarded as *quasi* creditors of the bankrupt, and entitled to have the dividends applied, as far as they go, in extinguishment of their liability for the bankrupt.

The assignee has no claim upon them or against them; they are in no sense liable to the bankrupt's estate, but the estate is under legal obligation to pay and protect them.

In *Raikes vs. Todd*, 8 Adolphus & Ellis Reports, 846, a guaranty very similar to this was under consideration, and in that case, as in this, the principal debtor had gone into bankruptcy, and the creditor had proven his whole debt, which was in excess of the amount guaranteed. The guaranty being for a sum not exceeding two thousand pounds, and the whole debt proven being over twenty-four hundred pounds; a dividend had been paid the creditor upon the whole claim proven, of about three hundred pounds, leaving over two thousand pounds due, and an action was prosecuted against the guarantor for the two thousand pounds, the amount guaranteed by him. The defendants pleaded the amount of the dividend ratably applicable to the amount guaranteed as a payment *pro tanto*, and contended that it was to be distribu-

ted ratably over the whole balance, and that his liability was discharged to the extent of the dividend applicable to the amount guaranteed by him; that as a security under this bankrupt act (the same as under ours) who had paid a debt, could stand in place of the creditor, the declared dividend should be appropriated as so much upon every distinct pound; the plaintiff contending that he might recover the dividend on his own proof and apply the whole in reduction of the excess above the sum guaranteed. This claim of the plaintiff, however, was not sustained. The court held that the security was to pay only the excess of the sum which he guaranteed over and above the dividend paid in respect of such sum. *Bardwell vs. Lydall*, 7 Bingham, 489, is to the same effect.

This seems to me a correct exposition of the meaning and principle of these provisions of the bankrupt act, in regard to sureties for the bankrupt, and secures to them the benefits and protection contemplated by the act. Applying this doctrine to this case, these creditors would be required to apply the dividend paid in respect to the amount guaranteed by Servis in reduction of the claim upon him, each dollar of the claim being considered as reduced to the extent of the dividend paid by the bankrupt's estate.

In that way the guarantor gets the same benefit as if he had paid the two thousand dollars guaranteed and then proved it up himself. It is in legal effect the same as paying it to the guarantor, as it is paid for his benefit and in extinguishment of his liability.

This view of the equities of the case and the legal rights of the parties shows very clearly to my mind that the creditor not only has the right to prove for the full amount, but that it is a legal duty to do so if he proves at all.

I, therefore, hold that these creditors, Richards, Shaw & Winslow, have the right to prove their full debt against the estate of the bankrupt in this case as an unsecured debt, and remit the matter to the register, with direction to proceed in accordance with this opinion.

See also on this point *In re Broich et al.*, post, p.303. [REPORTER.

THE KATE HINCHMAN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1876.

IN ADMIRALTY.

1. PRIORITY OF MORTGAGES OVER LIEN UNDER STATE LAW.—A duly recorded mortgage upon a vessel should be paid, in preference to a claim for supplies and materials furnished in the home port.

The original libel in this case, under which the schooner was sold, was filed by seamen, and the sale took place December 16, 1874. On that day the petitioners, Miller Brothers, and Gilbert Hubbard & Co., filed intervening claims for a portion of the proceeds of the vessel arising from the sale. These cases were submitted to the court under a stipulation of the following facts:

A mortgage was executed upon the schooner, dated March 1, 1871, which was duly recorded in the office of the collector at Chicago. The claim of Miller Bros. was for labor and materials furnished the vessel from January 1st, 1873, to December, 1874. Gilbert Hubbard & Co.'s claim was for supplies furnished, partly prior to 1871, and also during that year and up to October, 1874. Chicago was the home port of the vessel, and the supplies and materials were there furnished at the request of the master and owners.

Rae & Mitchell, proctors for material men.

John C. Richberg, proctor for mortgagee.

DRUMMOND, J.—The petitioners had a lien upon the schooner under the laws of the State of Illinois. There is not a sufficient fund in court, arising from the sale, to pay

the mortgage, as well as Miller Bros., and Gilbert Hubbard & Co., and the question is, whether the mortgage is to be paid in preference to the supplies and materials furnished in the home port.

I am of opinion that it is, and that it constitutes a prior lien upon the vessel, and should be first paid out of the proceeds. It may be admitted that if these supplies and materials constitute a maritime lien upon the vessel, this priority would not exist, but the case of *The Lottawanna*, 21st Wallace, 558, decides that these claims did not constitute a maritime lien, and although that case was decided under a strong dissent, still, whatever may be our personal views, we must assume it to be the law in the federal courts upon the subject, thus reaffirming the rule laid down by the Supreme Court of the United States in the case of *The Gen. Smith*, 4 Wheaton, 438.

In the case of *The Lottawanna*, the Supreme Court held that the claims which were made under the state laws of Louisiana were not valid because that law had not been complied with, and there was no obstacle arising in that way to prevent the payment of the mortgage there set up. In this case it is admitted that there was a valid lien for supplies and materials furnished the schooner, under the law of this state, and we are therefore met directly by the question whether the mortgage supersedes the state lien. The law of the state required that in order to make the lien available as against other creditors or subsequent incumbrancers, or *bona fide* purchasers, proceedings must be instituted within nine months after the indebtedness accrued. This would exclude a large portion of the claims of the libellants.

The 27th section of the act of 1850,[1] required in order that mortgages on vessels should be valid as against certain persons, that they should be recorded in the office of the collector of customs where the vessel was registered or

1 § 4192 Revised Statutes.

enrolled. That section provided that the lien by bottomry on any vessel created during her voyage, by a loan of money or for materials necessary to repair or enable her to prosecute the voyage, should not lose its priority or be in any way affected by the mortgage. This would seem to mean a maritime lien, and not a lien created solely by a law of one of the states. It was intended that in all such cases as are referred to in the proviso, the vessel should be bound independent of the mortgage, but as the lien in this case was not a maritime lien, it is not strictly within the terms of the proviso.

As the twelfth rule in admiralty now stands and as construed by the Supreme Court, a claim for materials, supplies, repairs, or other necessaries, where a lien exists by the law of a state, though not by the maritime law, may be enforced by the admiralty in a proper case of admiralty jurisdiction, but it by no means follows that because the law of a state gives a lien, it is superior to that of a mortgage. The case of *Aldrich vs. Ætna Company*, 8 Wallace, 491, is a strong illustration of this principle. There it was sought to make an attachment against the vessel, issued and served subsequent to the recording of a mortgage, supersede it because the law of the state as to the mortgage had not been complied with, which the Supreme Court decided could not be done.[2]

In the case of *The Emily Souder*, 17 Wallace, 666, the supplies and advances were made in a foreign port and constituted a maritime lien, and were properly held to be paramount to the claims of the mortgagees, and, indeed, were substantially within the spirit of the proviso of the act of Congress as to the recording of mortgages on vessels.

The Supreme Court of this state, in construing the law of the state in relation to the lien of boats and vessels in the case of *The Barque Great West, No. 2 vs. Obenndorf*, 57 Illinois, 168, and in the case of *The Propeller Hilton vs. Miller*, 62 Illinois, 230, held that the lien created by the

2 *White's Bank vs. Smith*, 7 Wallace, 649; *The Belfast* 7 Wallace, 642.

statute for supplies or materials furnished was subordinate to that of a mortgage given and recorded under the act of Congress; and it is held in the case of *The Grace Greenwood*, 2 Bissell, 131, that a mortgage properly recorded under the act of Congress, took precedence of the lien under the state law for supplies and materials furnished subsequent to the mortgage.

To the principles announced in that case, and which I believe have been followed in this circuit since, I still adhere. It seems to me, as between these different liens existing in this case, that of the mortgagee is paramount.[3] The legislation of Congress was upon a subject confessedly within its legitimate authority, and it must therefore override all state legislation upon the subject, even if any existed. As the decision of the District Court was in accordance with the views here stated, the decree is affirmed.

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3 *The Sky Lark*, 2 Bissell, 251; *The Lady Franklin*, Id., 121.

In re S. A. JEWETT *et al.*

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—AUGUST, 1876.

IN BANKRUPTCY.

1. ATTACHING CREDITORS NOT COMPUTED.—Attaching creditors are not to be counted nor their claims computed in ascertaining whether the petition for involuntary bankruptcy is supported by the "number and amount prescribed by statute."

Warner & Spooner, for attaching creditors.

Dewitt Davis and *William F. Vilas*, for petitioning creditors.

HOPKINS, J.—The alleged bankrupts filed denial of acts of bankruptcy, but raised no question as to the sufficiency of the number of creditors petitioning against them. Whereupon certain creditors who had attached within two months portions of the property of the alleged bankrupts, applied and obtained leave to intervene and deny that the petitioners constituted one-fourth in number or represented one-third in amount of the provable debts of the bankrupts. The bankrupts were thereupon ordered to file a list of their unsecured creditors, which they did, and one of them was examined in relation thereto before a Register. From the list and examination it appears that the petitioners constitute the requisite number and amount unless the attaching creditors are to counted among the list of unsecured creditors, so that the only question is as to whether the attaching creditors shall be included.

No direct authority in favor of such a proposition was cited on the argument. The case *In re Hatje*, 6 Bissell,

436, was referred to to show that they should be included in the computation, but as as I understand that case no objection was made to such course, as there were enough petitioners including them; but if that court intended to hold that they were to be included in the list, I must dissent from that conclusion.

Just after the argument I was referred to the case *In re Scraffard*, 14 Bankruptcy Register, 184, as a direct authority in favor of the claim of the attaching creditors to be counted. I have examined that case carefully, and am constrained to say that neither the cases cited nor the argument of the learned Judge satisfies my mind that his interpretation of the act is correct. It is too restricted and does not give full effect to the spirit or purposes of the act. Such creditors have security, therefore their debt is not provable until that security is abandoned or surrendered. Their security is hostile to and declared void by the terms of the act. It was an attempt by them to secure an unlawful preference in defiance of and contrary to the spirit and letter of the law. The object of the law was to place a creditor, who knowing the insolvent condition of his debtor but who undertook to secure his own debt by an attachment, upon the same footing as a creditor who obtained a preference by the consent of the debtor. He occupies no better position than a preferred creditor by act of the debtor. The security of both is void if proceedings in bankruptcy are instituted within the time prescribed. Both undertake to prevent the equal distribution of the insolvent's estate, which the bankrupt law was intended to accomplish, and I am not able to discover any ground upon which a valid or even plausible distinction between these cases or their status in the bankrupt court can rest. If attaching creditors are to be included in the number or computation, I think preferred creditors and all other parties whose security is or may be avoided by the bankruptcy proceedings should have the same privilege, and it is because I cannot see any ground of distinction, that I hold they are

not to be included in ascertaining whether the requisite number of creditors have joined in the petition. The construction contended for is placing the unsecured creditors wholly at the mercy of the secured creditors. In effect it is giving the control of the question whether a debtor may be proceeded against in bankrupt courts, to parties whose interests are in hostility to the bankrupt act, which would defeat completely the rights of the unsecured creditors to insist upon equal distribution of the estate which is their only remedy to obtain anything. No such unreasonable and unjust construction could have been within the intention of the legislature in adopting it.

The attachments are dissolved only on assignment to the assignee under § 5044 Revised Statutes of the United States. These creditors are now secured so that they have not now a provable debt, and are therefore by the very terms of the act excluded.[1] The fact that their security may be avoided if the case proceeds to certain other stages is not now to be considered. It is sufficient that they have not now a debt unconditionally provable to defeat their present claim.[2]

They applied and were admitted to defend to maintain their security. Now they want to occupy the position of unsecured creditors. Parties cannot play "fast and loose" in that way. The law does not favor such changes. It is stable and conservative and confines parties to consistent positions. If they want the rights of unsecured creditors, let them discontinue the attachment suits and they can have them at once. The act precribes the course for them to pursue.

The motion to dismiss on the ground that a sufficient number of creditors have not joined in the petition is therefore denied.

Since the above was prepared Judge DILLON has reversed the decision *In re Scraffard*, and held that attaching creditors were not to be counted. *In re Scraffard* Vol. 4 Central Law Journal, p. 19.—[Reporter.

1 § 12 of Act of 1874, Vol. 18, United States Statutes at Large, p. 181.

2. *In re Frost*, 6 Bissell, 213.

THE WILLIAMS MOWER AND REAPER COMPANY vs. WILLIAM C. RAYNOR.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—AUGUST, 1876.

1. ENFORCING PREVIOUS DECREES OF STATE COURT.—Where, in an action in a state court, an order was made for the production of sworn copies of books and papers, which was disobeyed, and contempt proceedings instituted and an order made therein, and subsequently the cause was removed to the United States Court, the latter court will recognize and enforce the order of the state court in the contempt proceedings as appertaining to the action removed.

2. APPEAL.—But if an appeal from the order in the state court has been taken to the Supreme Court, the United States Court will hold in abeyance proceedings for the enforcement of the order in question until the appeal is disposed of.

3. The fact that the contempt proceedings in the state court were not entitled in the cause removed, but in the name of the people of the state, will not prevent the United States Court from reviewing the proceedings, if such proceedings were in reality in aid of the civil suit.

This action was commenced originally in the state court. On the 26th day of December, 1874, an order was entered in the action requiring the defendant to deliver to the plaintiff sworn copies of entries in certain books kept by the defendant, and of certain notes, contracts and other writings alleged to be in his possession, the purpose of which proceeding was to enable the plaintiff to prepare a complaint in the action. On appeal to the Supreme Court of this state, this order was affirmed. On the 6th day of January, 1876, the state court made an order that an attachment be issued against the defendant as for a contempt in not complying with the order of December 26, 1874, and pursuant thereto, an attachment was issued. Upon issue formed, an inquiry was instituted as to whether the defendant was guilty of the mis-

conduct alleged; the result of which proceeding was that on the 12th of February, 1876, the defendant was adjudged guilty of contempt, in not obeying the aforesaid order of December 26, and he was ordered to forthwith deposit with the clerk of Milwaukee county court, where the action was then pending, the books mentioned in said previous order, and to pay to the Williams Mower and Reaper Company its costs in said proceedings, amounting to $110.80, and it was directed that he be committed to the jail of Milwaukee county, there to remain until the said costs should be fully paid and this order of February 12th should be fully complied with. These contempt proceedings were entitled, *The State of Wisconsin ex rel. The Williams Mower and Reaper Company vs. Wm. C. Raynor.* On the 23d day of February, 1876, and within thirty days from the entry of the last mentioned order, but subsequent to the filing of a petition by the plaintiff for the removal of the cause to this court, an appeal was taken from the order of February 12, to the Supreme Court of Wisconsin, an undertaking for stay of proceedings was at the same time filed pursuant to the state statute, and that appeal is now pending. On the fourth day of March, 1876, the state court, on application of the plaintiff in the action of the *Williams Mower and Reaper Company vs. Raynor*, made an order removing that cause to the United States Circuit Court, and the entire record including that of the contempt proceedings, is now in this court.

H. M. Finch, for plaintiff.

Jas. G. Jenkins, for defendant.

DYER, J.—Application is now made for an order requiring the defendant Raynor to forthwith file with the clerk of this court all of the books, papers, notes and writings mentioned in the order of the state court dated February 12, and that he pay to the plaintiff the money mentioned therein, and in all

things comply with that order, or in default thereof that he be punished as in said order provided.

This application is made under that provision of the statute of the United States, relating to the removal of causes into the courts of the United States, passed March 3, 1875, which declares that all injunctions, orders, and other proceedings had in a suit prior to its removal, shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.[1]

Resistance is made to the application upon the general ground that the proceedings which culminated in the order of February 12, adjudging the defendant guilty of contempt, were not proceedings in the action of the *Williams Mower and Reaper Company vs. Wm. C. Raynor*, but were in their character essentially independent of that action, and had for their object the vindication of the defied authority of the state court; that they were not taken in the civil action nor properly entitled in that action, but were proceedings in the name of the state, and were not transferred to this court with the removal of the main action.

I was strongly impressed with this reasoning upon the argument. Reflection upon it, however, has led me to doubt its correctness. While the proceeding in question, as argued, had as one object the punishment of the party for disobedience of a previous order of the court, it at the same time enforced a civil remedy in behalf of the plaintiff in the main action. Though it was a proceeding entitled in the name of the state on the relation of the plaintiff in that action, and was in a certain sense independent of the action as a proceeding involving punishment for an alleged neglect or violation of duty, it was also, I think, a step taken in the original action to secure the production of the books and papers in question for the benefit of the plaintiff. It was a special proceeding in the action, and its connection with the action

1 Vol. 18, U. S. Statutes at Large, Sec. 4, p. 471.

speed of about five miles an hour, heading north-northeast, and carrying double-reefed mizzen sail, whole mainsail, foresail, staysail and jib. The captain of the Gifford testifies that when he first discovered the Ætna, she was three or four miles away, and from a point and a half to two points on the starboard bow of the Gifford. The captain of the Ætna says that when he sighted the Gifford, she was from four to five miles distant, and from three to four points on the port bow of the Ætna. It seems not to be disputed that each vessel could be seen from three to five miles away, and that they were continually in sight of each other, from the moment when first observed until the collision.

It is plain that a collision thus occuring in open sea and in broad daylight, between two vessels easily seen miles apart, and whose courses, on the tacks upon which they were sailing, necessarily intersected each other, cannot be attributed to unavoidable accident. It is equally clear that the case is one where the 17th rule of the navigation act is applicable; that, "when two sail vessels are crossing so as to involve risk of collision, then, if they have the wind on different sides, the vessel with the wind on the port side, shall keep out of the way of the vessel with the wind on the starboard side," neither vessel being free, but both being close hauled.

This rule has been not only frequently, but rigidly enforced by the courts. *The Friends*, 1 William Robinson, 483; *The Chester*, 3 Hagg, 316; *The Woodrop Sims*, 2 Dodson, 86; *The Thames*, 5 Robinson, 345; *The Celt*, 3 Hagg, 327; *The Jupiter*, 3 Hagg, 320; *Allen et al. vs. Mackey et al.*, 1 Sprague, 219.

In the case of *St. John vs. Paine*, 10 Howard, 579, NELSON, J., in his opinion, says: "the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. * * * When vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her

course, while that on the larboard tack should bear up or keep away before the wind. * * * No one can look through the reports in admiralty in England, without being struck with the steadiness and rigor with which these general nautical rules have been enforced in cases of collision, under the advice of the trinity masters of that court, or fail to be impressed with the justice and propriety of such application, and the salutary results flowing from it."

In the case of *The Kingston-by-Sea*, 3 William Robinson, 153, it was an established fact that the two vessels had ample time to see each other at the distance of two or three miles, and had abundant opportunity to take measures to avoid a collision. The Kingston-by-Sea attempted to go in stays but missed, and the trinity masters held, first, that she had it in her power to choose the distance at which she would tack, and, secondly, if a vessel is put in stays and misses, it is the duty of those on board to so navigate the vessel as to let her pay off.

In the case of *The Ann and Mary*, 2 William Robinson, 189, the rule was declared as one to be strictly adhered to, that the vessel on the starboard tack must put her helm aport to keep the wind, and the vessel on the larboard tack must do the same to bear away; and the vessel proceeded against was adjudged in fault because she put her helm alee and did not bear away. See also *The Traveler*, 2 William Robinson, 198, Holt's Rule of the Road, 92, 100, 114, *Bently vs. Coyne*, 4 Wallace, 509.

That part of the rule, that a close hauled vessel on the port tack, must give way to one sailing by the wind on the starboard tack, close hauled, is not more imperative than is the further branch of the same rule, as enforced by the courts, that the latter vessel must keep her course. In the case of *The Richard B. Higgie*, 1 Lowell, 390, it was held that to relieve a vessel from fault in changing her course when the rule required her to keep it, she must show clearly that it was done after a collision had become inevitable, or, at least, after

a courageous and skilful navigator would have thought it so.

Justice CLIFFORD in the case of *Bently vs. Coyne*, before cited, says: "Persons engaged in navigating vessels upon navigable waters are bound to observe the nautical rules recognized by law in the management of their vessels, on approaching a point where there is danger of collision. Undoubtedly the same law which requires vessels having the wind free, or sailing on the larboard tack, to keep out of the way or give way, as the case may be, also imposes the correlative duty upon those close hauled on the wind, or sailing on the starboard tack, to keep their course, in order that the former may know the position of the object to be avoided, and not be baffled or led into error in their endeavors to comply with the requirement." See also *New York and Liverpool Steamship Co. vs. Rumball*, 21 Howard, 372.

Both vessels, in the present case, were in the precise position requiring compliance with the rule. There was devolved upon the Ætna the general duty to pursue her course, so that the Gifford might not be misled or baffled in her movements, and the duty imposed upon the Gifford was to keep out of the way of the Ætna. The burden was upon her of avoiding the danger of collision. The captain of the Gifford testifies that he sighted the Ætna when four or five miles away. The wind was fresh, causing about a six or eight-foot sea. Under these circumstances there can be no doubt that there was ample time and room for the Gifford to bear away under a port helm, and to have passed astern of the Ætna; and this is precisely the movement which the court in *St. John vs. Paine*, *supra*, says should be executed under such circumstances. But the master of the Gifford took the responsibility to execute a different maneuver, which was to continue on his course until, as he says, his vessel was three-quarters of a mile from the Ætna, when he attempted to put her in stays, which she missed.

Upon the positive testimony in the case, my conclusion is, that the Ætna kept her course until a collision became inevi-

table. It is urged that the Gifford was three-quarters of a mile off when she attempted to go in stays and stood in the wind, and that there was a space of 1185 feet between the Gifford's bows while in the wind and the direct course of the Ætna at that distance; from which the conclusion is deduced that the Ætna must have fallen off from her original course. But this theory rests strongly upon conjecture and is against the positive testimony on both sides, and is, I think against the circumstances. The captain of the Gifford as positively testifies that the Ætna kept her course as does any witness for libellants. Then it cannot be assumed as a certainty that the Gifford was three-quarters of a mile from the Ætna when she attempted to go in stays. Capt. Berryman states the distance as one-half to three-quarters of a mile. One of libellant's witnesses also testifies that the effort to go in stays was made from seven to nine minutes before the collision, and that the jib-boom of the Ætna was then pointed to the fore-rigging of the Gifford, which would certainly bring the latter vessel very near to the Ætna's course. It is clear that the Gifford was nearer to the point where the courses of the two vessels intersected, than was the Ætna, when the effort was made to stay the Gifford. The evidence is that she would forge ahead some distance under a slackening headway, after her wheel was put hard down, and adding to that, the possibility of her filling away again, a point disputed by the witnesses, I am constrained to believe, that at the time and point where the attempt was made to stay the Gifford, the proximity of the two vessels made that maneuver hazardous. The captain of the Gifford says, that at the point where his vessel stood, there was room to get out of the way if she did not miss stays; but that there was not room to do so if she missed, which tends strongly to show that the movement was not made at sufficient distance. It is exceedingly difficult upon all the testimony and in view of the ample time, space and opportunity which the Gifford had for taking a course that should be entirely safe for both vessels, to resist the con-

clusion that she was in fault in the movement she did make. She had it in her power to determine at what distance she would attempt to go about, upon choosing that as the maneuver for avoiding the Ætna. The burden was cast upon her by the law of the sea, of keeping out of the way, and when, with the time and room she had for adopting a course which would beyond question avoid not only a collision but all danger, it must be held that when she chose another course attended with hazard, she did so at her peril. It is true that the captain of the Gifford had not before had any difficulty in staying his vessel, but he says he never before attempted to stay her in such a sea. He may have exercised what he thought at the time was proper judgment, but his judgment proved erroneous, because his vessel missed in the attempted movement.

The testimony on the part of the claimants is to the effect that the Gifford was head to wind, with shivered canvass at the time of the collision; and upon the point of proximity to the Ætna, it should be noted that the captain of the Gifford says she was in the wind four or five minutes or more, and when in that position was too near the Ætna then to try to stay her. Moreover, the spirit of the rule laid down by the trinity masters in *The Kingston-by-Sea*, is, that when a vessel misses stays under such circumstances, efforts should be made to let her pay off instead of standing steadily in the wind.

It is true that experienced seamen have testified that the movements of the Gifford, as they are given by her master, were proper, though most of them speak cautiously, and make the case depend on circumstances. It is evident that their approval of going in stays in such cases, rests largely upon the fact that time and distance are saved, which are considerations certainly not to be weighed against safety.

One of these witnesses is so clear in his view, that the suitable course is to go in stays, that he gives it as his understanding of the rule of the navigation act, that when

two vessels are meeting on opposite tacks, close hauled, to avoid collision, it requires the vessel bound to give way, to put the helm down and go in stays, when, in fact, the rule says nothing about such a movement; and the diagram issued by the Bureau of Navigation, illustrative of the rule, shows that the port tack gives way to the close hauled starboard tack by porting. The captain of the Gifford gives as one of his reasons for going in stays, the fact that he would have lost time and distance if he kept his vessel off, a reason which cannot receive approval. Since it would have been entirely a safe and successful movement, in the time and space which the Gifford had, to have ported her helm and gone to the leeward of the Ætna, passing her stern, it seems clear that this should have been done. As some of the witnesses say, this movement would probably have carried her to some extent into the troughs of the sea; but the danger to the Gifford in this respect would have been less than the other course proved to be to both vessels.

The remarks of the court in *Allen vs. Mackey*, 1 Sprague's Decisions, 221, are applicable. The Gifford should have gone under the stern of the Ætna, "because by doing so the vessels would be constantly increasing their distance from each other, and because this course would not require on her part any calculation of the rate of speed at which the other vessel was going." The circumstance that, after the Gifford came up in the wind and did not go around, the captain then put the helm to port, is indicative of an attempt then useless, to do that which if done in proper season, would have avoided the collision.

But it is contended that the Ætna brought the injury upon herself, and that the collision was not averted because of her own recklessness. She stood on her course. In doing this, she was complying with the rule and with the principle laid down by the courts with so much emphasis, that when there is the least doubt of vessels on opposite tacks going clear, the vessel on the starboard tack should persevere in her

course. The Ætna had the right to proceed upon the presumption that the Gifford would give way and was in the act of doing so. Under the rules laid down in the decisions, her duty was to keep her course until a collision was impending; otherwise, the movements of the other vessel might be baffled. It is said that the Gifford was disabled, that her sails were shaking in the wind, and that her condition of alleged helplessness must have been apparent to those on board the Ætna. But I am not convinced that her disability was so great, when first she missed stays, as to render her entirely helpless. And, moreover, the fact that she stood in the wind, and that her foresails were shaking, would not be a conclusive indication to those on board the Ætna that the Gifford had missed stays. Captain Norris testifies that if he had been on the Ætna, he could not have concluded, upon seeing her head sails lifting, that the Gifford had missed stays, until he should see her fall off and fill away. Other witnesses on both sides substantially concur with him. Upon all the testimony I regard it as reasonable that those on board the Ætna would, from natural observation, judge that the Gifford was endeavoring to give way, and would give way. An extremity was soon disclosed that forbade the Ætna from standing further on her course, and that brought her within the principle of the 24th rule. Special circumstances were presented which made it necessary to depart from the rule of adhering to her course, and which involved "due regard to the dangers of navigation." And I think the testimony and the circumstances establish that when peril was impending, measures were taken to put the Ætna about. Of course the Ætna had not the right to persist in her course so as to run the Gifford down. If it became the duty of the master of the Ætna to take measures to keep out of the way of the Gifford, the question is, when did that duty begin. Following the reasoning of Judge Longyear in the case of *The H. P. Baldwin*, 1 Brown's Admiralty Reports, 300, it will not do to say that it began when it became probable that the

Gifford would not get out of the way, because by article 17 it was the duty of the Ætna to keep her course, and it would not do for her to change it so long as there was any room for doubt as to the intentions of the Gifford.

At what point did the duty arise requiring the Ætna to take steps to avoid a collision? She was where the law says she should be under such circumstances. Adopting further the language of Judge LONGYEAR, "the master of the vessel stood there with all the circumstances before him, and no doubt used his best judgment and acted accordingly. And although it may be now apparent that if he had given the order he did give, a little sooner, a collision might have been avoided, yet in view of the doubts with which the matter was necessarily surrounded at the time, I cannot say it was his duty so to have given the order," and that the Ætna is responsible because the order was not sooner given. *The H. P. Baldwin, supra.* I consider the Gifford as then in a position where she was to be regarded as a vessel in motion, with the duty resting upon her to give way to the Ætna, and so bringing the case within the principle of the decision, "holding, that where a vessel commits an error under impending danger, or *in extremis*, produced or brought about by another vessel, such error cannot be alleged as a fault by such other vessel."

The positive testimony of the men on the Ætna, that she was going about, head to wind, when the collision became imminent, is fortified by the fact that the jib-boom of the Gifford struck her foresail and then carried away the main rigging, and that the first blow was not forward of the foresail.

The case of the *Charlotte Raab*, 1 Brown, 454, has been cited by claimants' counsel. But there, both vessels were on the starboard tack, close hauled. The Wall properly went in stays to avoid ice on her lee bow. As to the Raab, the vessel proceeded against, the case was not within rule 17, and the situation was fully comprehended by her master, who

chose to push his vessel on, without giving the Wall time to get away on her port tack.

Decree for libellants.

JOHN F. CURTS *et al.* vs. STEPHEN CISNA *et al.*

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—AUGUST, 1876.

1. AGENT CANNOT ACQUIRE ADVERSE TITLE.—An agent to pay taxes on the lands of his principal, cannot acquire a valid tax deed on the same when they have been sold for taxes.

2. BONA FIDE PURCHASER.—Where an agent had acquired a tax deed on the lands of his principal, and had contracted to sell the same to a third party, who had no notice of the fraud, but his agent, in making the purchase, had such knowledge, and such purchaser had received a contract only for a deed, and had paid two-thirds of the purchase-money, *Held*, that the fact that the agent of such purchaser had had knowledge of such fraud, was not sufficient to affect his principal, unless the facts and circumstances were such as to show that he had the same in mind at the time of the transaction of the purchase; but that the right of such purchaser to call for a conveyance from the fraudulent grantee in the tax deed, was an equitable right merely, and that the right of the original owner being the oldest equity, must prevail.

3. BONA FIDE PURCHASER—MUST HAVE OBTAINED THE LEGAL ESTATE.—A purchaser under a contract for a deed, though he may have paid all of the purchase-money is not protected as a *bona fide* purchaser; nor, if he has not obtained a conveyance of the legal estate, can he insist on the repayment of what he has paid on the contract as a condition of surrendering his claim. He must rely on the responsibility of his vendor.

4. A purchaser without notice will not be protected against the superior equity of an adverse claim, and where a party had purchased what in reality was only a tax title, he must be held as having assumed the burden of maintaining that such tax title had extinguished the patent title, and which, as to him, was an adverse one.

Gregory & Pinney, for complainants.

Tyler & Dickinson, *R. J. McBride* and *B. F. French*, for defendants.

Before DAVIS and HOPKINS, J. J.

HOPKINS, J.—The bill in this case charges that one Horatio Curts was in 1865 the owner of the land in controversy, being 320 acres of heavily timbered land in Clark county, in this state and that he employed the defendant, Cisna, as his agent to pay the taxes thereon, as well as upon other lands owned by him in that vicinity, as he was a non-resident, and furnished him the funds necessary for that purpose; that the general taxes due in the winter of 1865, were paid by defendant for him, but a special war bounty tax was levied in February, 1865, of about $13.00, of which he had no notice, and for which the land was sold in May, 1865, without his knowledge; that the defendant Cisna continued to pay his taxes up to the time of his death in 1868; that on his death his property descended to John Curts, his father, who thereafter continued to employ Cisna to pay the taxes for him, as he had before done for Horatio, his son, and that he furnished the necessary funds to pay all taxes, and to redeem from tax sales as might be necessary, up to the time of his death in March, 1874; that the defendant Cisna paid the taxes up to the time of his death, either directly or by redemption, and never notified him of the tax deed mentioned in the complaint, or of the existence of the tax for which it was given; that in 1869 Cisna, discovering that the land had been sold for the special tax in 1865, and that the certificates were outstanding, purchased them, and on the 15th of June, 1869, took a deed thereon to himself, which he immediately had recorded; that after the deed to him he paid the taxes thereon with Mr. Curts' money the same as before, and sent receipts to him; that on the death of John Curts the claimants in this case succeeded to his interest and title as his

heirs-at-law; that the defendant Cisna, on May 29, 1874, contracted to sell the lands for $1,500 to the defendant Gage, through the agency of one B. F. French, an attorney residing in Clark county, who acted as Gage's agent.

The bill then charges that the land was worth $8,000, and that Mr. Gage or Mr. French, his attorney, had notice of the facts and circumstances under which defendant Cisna obtained the tax deed, and that only a part of the consideration agreed upon had been paid, and no deed had been executed or delivered by Cisna to Gage of the premises. The bill prayed that the defendants might be required to release all claim under the tax deed and that it might be decreed void against them.

The defendants file a joint and several answer, in which they admit the land to be worth $8,000, as charged in the bill, and that Cisna's title was a tax title, as stated in the bill. They deny that he was the agent of either Horatio or John Curts to pay their taxes on the land as alleged, and they allege that John Curts had notice of the tax deed, and deny that either Gage or French, his agent, in making the purchase had any knowledge or notice of Cisna's relations with the Curtses, or that he was their agent or owed them any duty whatever. It does not state when they or either of them first had notice of the plaintiff's claim, nor whether it was before or after the second payment of $500 in 1875, nor does it claim that a deed has been executed to Gage, or that he has any other right than is derived under the contract set out in the bill.

Upon these issues testimony has been taken, from which it appears most conclusively that Cisna was the agent of both Horatio and John Curts for the payment of their taxes on this land as charged in the bill.

The defendant's letters to them, and the tax receipts sent them by him, place that question beyond all doubt, and convict him of a most deliberate and outrageous fraud in the transaction of obtaining the deed, and also of falsehood in his

testimony in denying the agency. It is seldom that parties are enabled to establish the rascality of an adversary so incontrovertibly as the plaintiffs in this case have that of the defendant Cisna.

It appears that on the day he took this deed, he paid all the general taxes due or unpaid on the land, out of Mr. Curts' money, and sent to him the receipts and his account, including a charge of $5 for his services, and also $5 paid B. F. French for services, and wrote him as follows: "I went to Clark county and paid the taxes; your land is all clear now, except some that lies back from the river, there is a tax deed on, which was given in 1864," and again on the 16th of June, 1869, the day after he had taken and recorded this deed, he wrote him again about paying the taxes in Clark county, in which he said "the land is all clear now" with the exception of the old tax deed of 1864, and that he would see if that could not be released for the costs.

In view of these letters and receipts it seems preposterous that he should claim the land under that deed, or attempt to deny his agency. It must have required some courage coupled with a great degree of moral depravity on his part to deliberately write a falsehood of that character to his employer, who had trusted his interests in his hands. It looks like a carefully contrived scheme to defraud his employer of this valuable property.

He paid the general taxes and sent receipts therefor, and took the deed for the special tax, which was unknown to his principal, and therefore would not likely be discovered, as there would be no occasion for examination in regard to such a tax. He doubtless thought if he could conceal the existence and record of the deed for three years, the principal's right to impeach it would be barred, as the statute of this state limits the right of an original owner to three years to bring an action to defend or set aside a recorded tax deed.

But this is not all of his fraudulent conduct. He continued to pay the subsequent taxes out of Mr. Curts' funds, and to

send him the receipts. This became a necessity to avoid inquiry on the part of Mr. Curts, and the consequent investigation, which would necessarily expose him before his scheme had existed three years.

It is true, he swears that he told Mr. Curts of the existence of this deed in 1870, but his testimony on that point, Mr. Curts being dead, was incompetent. But if not incompetent, it is incredible. A careful examination of the letters written by him to Mr. Curts after that time (and they are numerous) shows that no mention was made of any such deed, although reference is made to tax deeds on other portions of his land. From this silence we are constrained to discredit his testimony upon that point, as well as upon the question of his agency. It is also true that a Mr. Bowman swears that he told Mr. Curts of this deed in 1870, and so does Mr. B. F. French testify that he spoke to him about it once. But from the whole evidence and conduct, the transactions of the parties, Curts and Cisna, subsequent to that time, we think these witnesses must be mistaken; that their conversation must have related to some other tax deed, or have been understood by Mr. Curts as relating to some other tax deed.

The position occupied by Mr. French in reference to this matter is not wholly free from suspicion. The evidence may not be sufficient to charge him as a confederate of Cisna, but there are circumstances that require close scrutiny into his conduct, motives and testimony. He swears he had the tax certificates and sold them to Cisna, knowing they were on Curts' land, on condition that Cisna should take a deed and not let Curts have them, and yet charges $5 for services rendered to Mr. Curts on the day of the deed, that Cisna paid, and neither he nor Cisna is able to state what those services were, and very soon after Mr. Curts' death, we find him negotiating for this title with Cisna, and all in the name of Mr. Gage, the other defendant. It is also shown that Cisna paid him $50 out of the first payment for his services in buying the land from him, which, in short, was paying him for

buying this land of him for a client of his—a transaction almost as questionable at that of Cisna in taking the tax deed. He probably knew all about it, but as there is no proof that he acquired such knowledge during the time he was acting as agent for Gage, Mr. Gage's rights would not be affected by his former knowledge, unless we presumed that he had the facts of the case in his mind at the time, which his evidence negatives. But it is not necessary to pursue the examination of Cisna's rights any further. He did not acquire any rights under the deed, and is not entitled to any benefit or advantage therefrom, and whatever he has received he should pay back, either to his co-defendant, from whom he received it, or to the complainants, the victims of his contemptible fraud.

This brings us to the consideration of the rights of the defendant Gage.

In the answer, the rights of a *bona fide* purchaser are claimed for him. The facts to constitute him such are imperfectly stated in the answer, but as the parties have gone to a hearing, we will examine the question upon its merits, not regarding any technical imperfections in the pleadings.

The defendant Gage is not within the authorities a *bona fide* purchaser, for to constitute such the purchase must be completed by a deed, and the consideration be fully paid, before notice of complainant's rights. [1]

In this case the consideration was not fully paid, nor was there a deed to Mr. Gage. The title, while in the vendor, Cisna, is considered as held for the benefit of the prior equity in preference to those of later origin, so that the defendant Gage is not entitled to the land. The only question remaining is whether he is entitled to have the amount he had paid toward the purchase, to wit, the $1,000, refunded before the surrender of his claim.

1. Hill on Trustees (marginal) p. 514 *et seq; Boone vs. Chiles*, 10 Peters, 177, 242; See Leading Cases in Equity, p. 93, *et seq;* See also, *Hunter vs. Simrall*, 6 Littell, 62; *Blight's Heirs vs. Banks*, 6 Monroe, 192; *Halstead vs. The Bank of Kentucky*, 4 J. J. Marshall, 555; *Moore vs. Clay*, 7 Alabama, 142.

This involves the consideration of a good many questions, and first, not being a *bona fide* purchaser, not having the legal title, can his interest be considered as other than an equitable right, and if so, does he not fall within the rule that when both parties' rights are equitable, the older prevails?

The equitable right of these complainants to this land as against the defendant Cisna, under whom the defendant Gage claims, it is clear and unquestionable. His title, the tax title was obtained without any act or deed on their part, and was obtained by fraud and without consideration to them, so their equity is perfect and the older.

The defendant Gage has a contract for the land upon which he has paid $1,000, before the commencement of this suit. Now, is his interest anything but an equitable one? If not, it must yield to the complainant's. In *Peabody vs. Fenton*, 3 Barbour's Chancery 451, 465, it is held that if a *bona fide* purchaser has not obtained the legal title by a valid conveyance, he cannot protect himself against the prior equity of the original owner, although he has a contract for the purchase and has actually paid for the land, and cites in support of that doctrine, *Wigg vs. Wigg*, 1 Atkyns, 384; *Tourville vs. Nash*, 3 Peere Williams, 307; 2 Sugden on Vendors, 274, 9th edition.

In *Boone vs. Chiles, supra*, the court examine the subject to ascertain who are entitled to the rights of a *bona fide* purchaser, and arrive at the conclusion that such rights exist only "when a prior equity can be barred or avoided only by the union of the legal title with an equity arising from the payment of the purchase price without notice and a clear conscience."

If this if a correct statement of the rule, the rights of a *bona fide* purchaser do not attach upon paying the purchase price and taking a contract for a deed, but only on a union of a legal title with the payment, and that until such union the right of the purchaser is equitable, and a prior equity must prevail.

This view is supported by the weight of American and English authorities, and is fatal to defendant's claim of protection as to the $1,000 paid before surrendering his rights under his contract. He must look to his contract and seek redress of the party with whom he contracted.

But there are some other questions presented in this case that deserve some notice from their importance.

The fact is admitted by the pleadings that the defendants contracted to buy this property for less than one-fifth of its real value. Is he entitled, in view of that fact, to be treated as a *bona fide* purchaser without notice? Under such circumstances, should not a court presume that he had notice of the defective and imperfect character of the plaintiff's title, particularly in the absence of any explanation on the subject? The purchaser of a promissory note at such a discount, would not, by the law merchant, be regarded as a *bona fide* holder for value to cut off the equities of the maker, and should a court of equity look with more favor upon a transaction apparently so unjust and unconscionable?

It would seem to be not consistent with the quality of equity to do so without some satisfactory explanation of such gross inadequacy, especially where the party claiming under such contract is seeking to defeat a prior equity of unquestionable character, as that of the plaintiff's in this case is.

This case differs in another important respect from the reported cases when the rights of the *bona fide* purchasers are discussed.

In the most of them the plaintiff had voluntarily parted with the title, had made a sale and delivered a deed and was seeking to avoid it on the ground of fraud on the part of his grantee in obtaining it. In that class of cases courts of equity very properly lean toward the protection of a party who had bought, relying on the record and apparent title.

But in this case, the plaintiffs and intestate have not conveyed; they had not clothed Cisna with any apparent title. The record shows them to be the original owners, and

that Cisna's claim was adverse—only a tax title, which probably accounts for the inadequate price paid. The record disclosed also that Cisna had obtained this property, worth $8,000, for about $13.

This places the parties in a different attitude before the court. It is the case of the purchaser of an adverse title seeking the protection of a *bona fide* purchaser as against the real owners and claimants. No case has been found where the purchaser of an adverse title has been allowed to demand of the real owner what he may have paid for the adverse title as a condition of surrendering his worthless claim.

In *Moore vs. Dodd*, 1 A. K. Marsh, 103, it is held that a purchaser without notice will not be protected against a superior equity, deduced under an adverse claim. Mr. Gage knew his vendor's title was a tax title only, and should be held as having assumed the burden of maintaining that it had extinguished the title of the plaintiff, which was the record title, and adverse as to him.

Courts of equity should pause before going to this extent. A party who obtains "acres for cents," as tax title owners are charged with doing, hardly occupies a position which authorizes him to introduce to courts of equity, parties claiming under him as innocent purchasers as against the parties owning the original title. Grantees cannot be transformed so readily into subjects of favor in those courts. The taint of the original transaction will adhere to them until they show, at least, that they had paid full value, which might warrant a court in presuming that they had purchased in the belief that they were getting a good and perfect title. But when, as in this case, the purchaser pays only one-fifth of the real value, he cannot be entitled to claim the protection, or the favorable consideration due to a *bona fide* purchaser, but should rather be looked upon as a speculator in questionable titles.

In view of all the testimony in this case, we have come to the conclusion that the defendant Gage must be considered as not occupying the position of a *bona fide* purchaser, and

therefore his claim is no better than that of Cisna, and that he, as well as Cisna, must surrender and release all claim or title to the land in controversy, and pay the costs of this case to be taxed.

The complainants, upon paying into court the amount paid by Cisna for special tax certificates and interest thereon, will be entitled to a decree requiring the defendants to release and relinquish all right and title to said land, and perpetually enjoining them from setting up or claiming any right derived under or through the tax deed mentioned in the bill of complaint.

I concur in this opinion.

D. DAVIS, Circuit Judge.

In re LAMMER.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—AUGUST, 1876.

IN BANKRUPTCY.

1. HOMESTEAD EXEMPTION—In Wisconsin, does not extend to a business block, used as a dwelling. The question is not determined by occupation, but by the character and construction of the building.

2. If there is a dwelling house and a store upon the same lot, the assignee can set off the former as a homestead.

3. DIVISION OF BUILDING.—The court will not divide a building and assign the bankrupt a part occupied by him.

The bankrupt, when he filed his petition, was the owner of lot 5, block 118, in the village of Menominee, 44x132 feet in size, upon which was a new brick block just finished, and an old house which had formerly stood on the site of the new block, and had been used as a dwelling house. When the block was built, the house was moved onto the back part of the lot, and placed on blocks fronting on a side street, the new block being on the front. It was repaired sometime afterwards, and the family of the bankrupt moved into it and occupied it as a dwelling house up to a short time before the filing of the petition in bankruptcy.

The new block was finished for business purposes, and not as a dwelling house. There was a saloon and billiard-room in the basement, two stores on the first floor, and a public hall in the second story. The entrance to the basement and hall was on the corner outside. The bankrupt occupied one of the stores for his business as a merchant, and had offered the other store for rent up to the time he moved into it with a part of his family. The new block cost about $9,000, and was mostly paid for out of the business of the store.

The creditors, about the time it was finished, commenced pressing for their pay, and some sued him, and when he filed his petition in bankruptcy his personal property was in the custody of the sheriff on execution.

After his creditors commenced suing him, he placed some board partitions in one of the stores, not extending to the ceiling, and moved in there with his wife and child, leaving his father and mother, who lived with him and constituted a part of his family, in the old house. After he moved in he claimed it as his homestead. In about a month after that time he filed his petition to be declared a bankrupt.

The assignee, however, refused to set off the new block as a part of his homestead, but set off the balance of the lot, including the old dwelling house and all of the lot except 44x56 feet on the front end. The bankrupt then moved the court to set aside the assignee's report, and for an order

that he set off the whole lot as exempt, on the ground that it is his homestead.

E. B. Bundy, for bankrupt.

F. J. & W. C. McLean, for assignee.

HOPKINS, J.—The statute of this state exempts not to exceed one quarter of an acre of land in a village or city and "the dwelling house thereon," owned and occupied by the debtor as a homestead. In order to constitute a homestead under the statute, it will be seen that it must be the dwelling house of the debtor, not a store, saloon or shop; so it becomes necessary to first determine whether this block can be considered a "dwelling house" within the meaning of the statute. This is a question of fact to be ascertained from the evidence.

It is conceded that it was not built for, nor intended as, a dwelling house, which is apparent by the construction of the building itself. It has none of the conveniences or comforts of such a house, and the bankrupt himself testified that he intended to build his dwelling house on some other lots in another part of the village which he had commenced to improve with that view. So I must find that it was not built nor intended for a dwelling house, and was not suitable in its then condition for such use, and was not in any reasonable sense a dwelling house, unless a debtor arbitrarily has the right to call anything he pleases a dwelling house, and, by moving into such building, estop a court from all further inquiry into its character.

This is, substantially, the bankrupt's claim in this case. If occupation is alone to determine the question, then a grist mill, or cotton or woolen factory, or saloon, or church, may be a dwelling house and exempt as a homestead, for a party could move his family into either and live there as the bankrupt did in this store.

But I do not think the statute will allow of such a construc-

tion. It uses the words "dwelling house" in its common and ordinary sense, and to distinguish it from other kinds of buildings. Those words are used as a limitation upon the right of the debtor, and restrict his claim to that character of building.

I do not mean by this to go so far as to hold that it must be exclusively used for that purpose, but in some reasonable sense it should be susceptible of being a dwelling house.

A building may be constructed for a store and dwelling house, saloon and dwelling house, but its construction should in some manner and to some extent manifest its character of dwelling house so as to give some appearance of good faith, in calling or claiming it as such.

If this is the true meaning and construction of the statute, could this party after he had built this block for business purposes with no appearance or claim that it was to be used as his dwelling, on the eve of bankruptcy move into it, and thereby change its character, and thus withdraw from the reach of his creditors that amount of his property? If he can, he had within his power the right to commit a great fraud upon his creditors, and if the law upholds such a transaction, it may be said to sanction what honesty would denounce as a great moral wrong.

But I do not believe the act admits of such a construction.

This block was built mostly by goods out of the store—his creditors' property—and does any one believe that if he had told his creditors that it was to be claimed as his homestead, they would have stood by and seen him put the property to such a use? Most certainly not. He was not worth anything; he had no means to put into a homestead; he was owing more than he could pay; and having built the block under such representations to his creditors, he should be estopped from interposing a homestead claim to it just as soon as he had finished it.

They rested easy when he was building a business block with their means, for that was not placing the avails beyond

their reach. Their remedy was not at all impaired by that change. But to allow him by a simple act of his will to withdraw all that property by moving his family into it and claiming it as his homestead, is too unconscionable to be sanctioned if within the power of courts to prevent it.

In this case he says this building cost him $9000, a larger sum by a good deal than the value of his other property liable to the payment of his debts. The assignee, acting upon what he supposed the better construction of the act, refused to set off the block as a dwelling house or as a part of the homestead exemption.

The bankrupt claims that the old wooden dwelling house is in bad condition, and is located amid unpleasant surroundings. The evidence shows this complaint is not wholly groundless, but he did use it as a dwelling house as long as he meant to pay his debts, it would seem, and did not discover its defects until he conceived the idea of not paying his creditors. Then he seemed to discover that it was too poor to live in. This discovery was coeval with his intention to defraud his creditors. In his insolvency he became ambitious for a better dwelling house than when he deemed himself able to pay his debts, and hence moved into this block. It was conceded on the argument that he moved in under advise of counsel to be able to hold it as his homestead. But the wooden building was a dwelling house and the block was not, and the occupancy being commenced under such circumstances and such motives, cannot be held to accomplish the purpose designed. The fraud of the party vitiated its effect and rendered the act nugatory.

Indeed, I cannot believe from the evidence that the occupancy for residence of his family was intended to be permanent. It was a mere experiment to frighten his creditors—not *bona fide*, so that all the claims based upon the pretended occupancy fail for want of reality and good faith.

All such devices are plain violations of the true spirit and meaning of the homestead law. It was intended to secure a

"home" for the family, and therefore exempted the "dwelling house." It was not intended as a refuge for dishonest debtors to retire to when overtaken by bankruptcy, and thereby keep their property away from their creditors.

In view of the frequent complaints that I hear against the law, I will venture to suggest that they all have their origin in the omission to prescribe a limit upon the value of the homestead to be exempted.

Bankrupts too often occupy the most elegant and costly residences under claim of homestead. Those of weak moral perceptions very frequently are distinguished in that direction, and do not seem to be at all disturbed by the fact that they are built out of the property of their creditors. Such fraudulent use of their creditors' money often provokes severe comments upon our homestead law.

The Supreme Court of the state has often given expression to sound views on the subject, and in *Casselman vs. Packard*, 16 Wisconsin, 114, they decided that all the buildings on the quantity of land that might be exempted, were not exempt; that only the "dwelling house" was exempt, and stores and shops or other buildings on such land were not.

The assignee, recognizing this as the law, set off only the dwelling house. He held that the block was not a dwelling house, in which opinion I fully concur.

The bankrupt's counsel argued that the room in the block occupied by the bankrupt, could be set off, if not the whole block; that the court could divide the building horizontally and perpendicularly and give him that part, and cited *Phelps vs. Rooney*, 9 Wisconsin, 70, on that point. Something of that kind is said by the Chief Justice in his dissenting opinion, but the idea was too chimerical to find favor with that court, and until it is sanctioned by the state courts I shall not attempt its adoption here.

I place my decision on the broader ground that this new block was not a "dwelling house" in fact, and the pretended occupancy of it, as such, was not in good faith, or intended

to be, nor was it intended to be permanent, and therefore no change in the real character of the building was effected by that attempt at occupation by the bankrupt.

This doctrine is not new in the federal courts in this state. In *In re Wright*, 3 Bissell, 359, the bankrupt, a few days before going into bankruptcy, sold his dwelling house and moved into his store and claimed that as a homestead, but the court disallowed the claim and held that it was intended as a fraud on the creditors, not a *bona fide* change. Such I think, is the case here, and therefore deny the motion to set aside the report of the assignee.

In re BURNELL BROS.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1876.

IN BANKRUPTCY.

1. FEES OF MARSHALS—SERVICE OF ORDER AND PETITION.—An order to show cause issued on a creditor's petition in bankruptcy, provided that a copy of the petition should be served with a copy of the order. *Held*, that the Marshal was entitled to a fee for the service of each, even though they were served at the same time.

2. DISBURSEMENTS.—Section 829 of the Revised Statutes, providing that the Marshal shall be allowed "for disbursing money to jurors and witnesses and for other expenses two per centum," held not to be limited to expenses of court.

3. NOT ENTITLED TO COMMISSION ON PROPERTY.—The Marshal is not entitled to an allowance for the custody of property by way of commissions on its value. *In re Johnston & Hall*, 12 Bankruptcy Register, 345, commented on.

In the bill of fees rendered by the Marshal in this case, he included the following items: for serving creditor's petition on the two bankrupts, two dollars each; commission on disbursements at two per cent., thirty-eight cents, and commission on value of stock seized and held by him, thirty dollars and ten cents. In the taxation of costs the clerk rejected each of these items and the Marshal appeals.

DYER, J.—*Item one.* The view taken by the clerk upon this item was, that as the order to show cause issued on the creditor's petition provided that a copy of the petition be served with a copy of the order, and as a copy of the petition must necessarily be served at the same time with the order, the service of the petition was part of the service of the order, and that it was but one service, and therefore but one fee for the service of both papers should be charged. There is a good deal of force in this ruling, but I incline to the opinion that it is too strict.

General Order No. 30, in bankruptcy, provides that "the fees of the Marshal shall be the same as are allowed for similar services by the fee bill in section 829 of the Revised Statutes, as modified by section 5126," etc. Section 829, Revised Statutes, provides that the Marshal will receive "for service of any warrant, attachment, summons, capias or other writ, except execution, venire, or a summons or a subpœna for a witness, two dollars for each person on whom service is made." The service of an order to show cause is not mentioned either in General Order No. 30, nor in section 829, nor in section 5126, of the Revised Statutes. There is no express provision prescribing fees for services of either an order to show cause, a creditor's petition, or an adjudication in bankruptcy; yet it is required by statute that each of these papers be served, and they must be served by the Marshal when placed in his hands for that purpose. Section 5025 requires not only that a copy of the order to show cause "shall be served on the debtor by delivering the same to him personally, or leaving

the same at his last or usual place of abode," but it requires further, that the petition shall be similarly served. The service of two distinct papers is thus made necessary by express words of the statute.

It is not disputed that a charge for the service of an order to show cause is allowable as a service similar to such as is allowed in section 829, and that the right to make such charge rests upon a construction of the statute in connection with order No. 30. Since it is essential that the petition as well as the order to show cause be served, is it not as accurate to say that the service of the petition is an act similar to those enumerated in section 829, as to say that the service of an order to show cause is such act? Since the statute expressly requires service of the petition, I do not regard the fact that the order to show cause provides that a copy of the petition be served, as very material, even as bearing upon the point that the service of both the order and petition constitutes but one service. To make the commencement of bankruptcy proceedings valid and complete, where the debtor can be found or his place of residence be ascertained, both the order to show cause and the petition must be served, and returns of each service must be made. In the view I take of the question, I shall allow the charge for the service of petition, which was rejected by the clerk.

Item two. Section 829 of the Revised Statutes provides that the Marshal be allowed "for disbursing money to jurors and witnesses and for other expenses, two per centum." The Marshal charged this per centum on his disbursements in this case, and the clerk disallowed it on the ground that money paid to jurors and witnesses constitute expenses of the court, and so that the words "other expenses," in the clause in section 829, giving to the Marshal his per centum, must be held to mean court expenses only. But disbursements to witnesses may not, accurately speaking, be expenses of the court. Moreover, section 829 is a general fee bill, prescribing generally the fees to be charged by the Marshal, and, I do

not see how the court can restrict by construction, the terms of the clause in question, and limit them in their meaning to expenses of court. I think the item should be allowed. The same point was so ruled in *Johnston & Hall*, 12 Bankruptcy Register, 346.

Item three. I think that the item of thirty dollars and ten cents charged as commission on the value of the property seized and held by the Marshal, was properly disallowed. General Order No. 30 provides that the Marshal shall receive "for each hour actually and necessarily employed in personal attention in taking care of bankrupt's property, one dollar;" and "no other allowance to be made for custody of property, except for actual disbursements, which shall, in all cases, be passed upon by the court." This would seem to settle the question, as there appears to be here an express limitation upon the amount of compensation to be paid to the Marshal, for custody of the property. But he claims, upon the application to the case of certain provisions of section 829, and upon a ruling of Judge BLATCHFORD, *In re Johnston & Hall*, 12 Bankruptcy Register, 346, that he is entitled to these commissions; and even admitting that allowances for custody of property are limited by order No. 30, it is still claimed that this compensation should be allowed for the seizure necessarily made, and its incidents of risk and responsibility, and that the service is similar to that rendered by the Marshal in admiralty, in regard to property which comes into his hands under an attachment *in rem.* If there is any where any support for this claim, it is in a provision of section 829, which provides that "when a debt or claim in admiralty is settled by the parties, without a sale of the property, the Marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars; *Provided*, that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof."

In the case of *Johnston & Hall, supra*, the Marshal was allowed commissions at the rates named in this clause of section 829, upon moneys collected and received by him as proceeds of the estate; Judge BLATCHFORD holding the service thus rendered by the Marshal to be similar in that case, to the service rendered in admiralty, for which compensation is given by the provision of section 829, before cited. In that case, the Marshal further charged commissions for custody of property, and also commissions on the value of the same property. It would seem from the opinion of the court, that the first of these charges was disallowed as forbidden by General Order No. 30, and that the second charge, viz: commissions on value of property was allowed at the rates prescribed in the provision before referred to, in section 829. With great respect to the learned judge who so ruled, I do not perceive how the disallowance of the first of these two items, and the allowance of the other, can be consistently upheld. Without either adopting or declining to adopt, even upon similar facts, the rulings of the court, in that case, by which commissions on moneys and the value of property were allowed to the Marshal, it is sufficient to say that the case of *Johnston & Hall* so radically differs from the case at bar, that the former can hardly be regarded as an authority upon the question presented. For it must be observed that in that case, the affairs of the bankrupt's estate had been settled, and the property was returned to the bankrupt, subject to the payment of the fees of the Marshal. This being the fact in that case, the court adopted an analogy between that case and the case contemplated by the clause cited from section 829, where "the debt or claim in admiralty is settled by the parties without the sale of the property." The analogy drawn by Judge BLATCHFORD, as will be seen, was made to depend upon the disposition of the controversy by settlement, which was made by the parties. In the case at bar, there was no such settlement. It is the ordinary case of seizure of property by the Marshal, delivery of the property

to the assignee upon his appointment, and the continued progress of the proceeding, according to usual forms and methods prescribed by law.

The case in this particular comes so far short of that contemplated by section 829, and there is such failure of analogy, that the claim of the Marshal to these commissions cannot be sustained.

In re GEORGE JACKSON *et al.*

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1876.

IN BANKRUPTCY.

1. POSTPONEMENT OF PROOF OF DOUBTFUL CLAIMS.—Where there is a reasonable, substantial doubt in the mind of a Register as to the validity of any claim, and as to the right of the alleged creditor to prove it, he can postpone the proof of such claim until after the election of an assignee.

2. PRACTICE—REVIEW.—Where a review by the District Judge of the action of the Register in such cases is sought, the better practice on behalf of creditors who object to the postponement of such claims, is to at once have the objection entered, obtain a stay of proceedings, and have the case certified before any further action before the Register is taken, for if no objection is made at the time and the assignee is appointed and enters upon his duties the court will not interfere.

3. PROOF OF DEBT BY AGENT.—It is not a sufficient cause for the proof of a debt by the agent that the principal is "traveling and supposed to be in Colorado," as the statute when it mentions absence of the claimant as ground for verification of the claim by an agent, speaks particularly and only of absence from the United States. The words "some other good cause" mean some sufficient cause other than mere absence from the state.

4 IRREGULARITY IN ADMITTING CLAIM.—Where a claim is irregularly admitted, but the result of an election of assignee would not be changed by

its exclusion, the court will not set aside the proceedings on account of irregularity in admitting this claim.

5. Upon failure to elect an assignee by the creditors, the Register may appoint one, if specific objections are not made.

6. "OPPOSING INTEREST,"—In the Bankrupt Act § 5034 means an opposition to the exercise of the appointing power by the Register—not an opposition to the appointment of any particular person.

Motion to set aside appointment of assignee.

On the 5th day of August, 1876, the first meeting of creditors was held for election of an assignee. Among other creditors named in the bankrupt's schedules, were Margaret Crompton, whose claims were therein stated as amounting to $1,890, Elizabeth Crompton, whose claims were stated to be $1,070.64, Anna T. Codman, alleged to be a creditor to the amount of $1,000, Joseph Jackson, whose claim was scheduled at about $700, and Mary Jane Jackson, whose claim was stated to be $1,736. All these demands were described in the schedules as contracted in 1876. At the meeting, these parties presented proofs of debt in due form. There were some discrepancies between the amounts of these claims, as stated in the schedules, and as offered for proof, and all the claims arose upon promissory notes, bearing various dates in 1873, 1875 and 1876.

Before proceeding to vote for assignee, J. V. Farwell & Co., creditors of the bankrupts, presented to the Register an affidavit or petition, stating that the five claimants before mentioned, were all relatives of the bankrupts; Mary Jane Jackson being the wife of the bankrupt George Jackson, Joseph Jackson being a brother, and Anna T. Codman being a sister of the bankrupts, and Elizabeth and Margaret Crompton being relatives by marriage of George Jackson. The petition also stated that the petitioners believed these claims to be fictitious to a great extent, and to be proved up for the purpose of controlling the election of an assignee in the interest of the bankrupts, and for no other purpose, and that the same should be inquired into. Some testimony was taken to

the effect that these alleged demands did not appear on the books of the bankrupts, nor in any bills payable account, and the discrepancies between the amounts of the claims as scheduled and proved were pointed out to the Register. Whereupon he postponed the proof of these five claims, and directed the election to proceed. No objection was at the time taken to this postponement, and the remaining creditors proceeded to vote for assignee. There was no choice and the Register appointed George Tracy, then provisional assignee, as general assignee. The Register certifies that before making the appointment, he announced to creditors that it became the duty of the Judge to appoint in case of any opposing interest, and in answer to an inquiry by the attorney for some of the creditors, explained that the terms, "opposing interest," did not mean a contest as to who should be elected assignee, but meant opposition to the exercise of the power of appointment by the Register. He certifies further, that no objection was made to an appointment by the Register, and no opposing interest was disclosed. Among other creditors participating in the vote for assignee was Elam Beardsley, who appeared by an agent, who made proof of the claim for his principal, and stated in the sworn proof, that he was a duly authorized agent of Beardsley to make and verify the claim; had knowledge and personal possession of the demand; and that his principal was then traveling and supposed to be in Colorado. No objection at the time was made to the proof of this claim. On the 11th day of August, six days subsequent to the meeting and appointment, the creditors whose claims were postponed, and some other creditors who participated in the proceedings of the meeting, excepted in writing, first, to the postponement of the five claims before mentioned, second to the reception of the vote of Elam Beardsley upon his claim as proved, and third, to the action of the Register in appointing an assignee.

On the same day, a petition to set aside the appointment of the assignee was filed, and the Register thereupon certified

the proceedings had before him, to the District Court.

John B. Winslow, for creditors petitioning to set aside appointment of assignee.

Jenkins, Elliott & Winkler, for creditors opposed.

DYER, J.—Section 5083 of Revised Statutes provides, that "when a claim is presented for proof before the election of the assignee, and the Judge or Register entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen."

Obviously, under this language of the statute, it is not required, in order to justify the postponement of proof of a claim until after the election of an assignee, that the Register should be satisfied, or have before him positive evidence, that the claim is invalid or that the creditor has no right to prove it. Upon facts or circumstances being laid before him, which create in his mind a substantial doubt upon the question of validity or of the creditor's right, it is his duty to postpone the claim for investigation. The necessity for a prompt election or appointment of an assignee being usually imperative, the theory of the law seems to be, that such election or appointment shall not await an investigation—in many instances necessarily protracted—of all the facts touching the validity of the claim. It therefore not infrequently occurs that a claim is postponed and is not permitted to be represented in the choice of an assignee, which is subsequently admitted to proof upon full showing made.

I. The doubt in the mind of the Register should be a reasonable, substantial doubt, resulting from a judicial consideration of the question. Such investigation is therefore required as will influence the mind to a conclusion as to whether there is such doubt of the validity of the claim or of the creditor's right to prove it. The Register cannot postpone claims on

mere objections. If bare objections are made and the Register nevertheless regards the claims as valid and admissible, the court should be at once applied to, if the objections are insisted on, since "the Register has not the power to proceed to a choice of assignee without the votes of all the creditors who wish to vote, if their votes can influence the result, unless the Register himself considers their claims doubtful."[1]

There is no doubt, that where the power of postponement is erroneously exercised by the Register, the creditors prejudiced may have the judgment of the court on the question, and it then becomes the duty of the court to consider whether the facts or circumstances laid before the Register warranted a judicial determination that the claim in question was of such doubtful validity as to justify an opinion that the claim or the creditor's right should be investigated by an assignee.[2]

The Register has certified in this case, that he had such doubts as to the validity of the claims in question, and as to the right of the alleged creditors to prove them, that he was of opinion that such validity or right should be investigated. The fact of relationship of the parties whose claims were postponed, to the bankrupts, would not alone justify the Register's action. Nor would the single fact of discrepancies between these claims as scheduled by the bankrupts and as offered for proof, because those discrepancies might arise from computations of interest, but with these circumstances, he had the sworn statement of other creditors, that in their belief, the claims were to some extent fictitious and were proved for the purpose of controlling the election of assignee, in the interest of the bankrupts. And added to these, was the circumstance that these demands did not appear upon the books of the bankrupts, nor in any bills payable account kept by them. This must have been in the mind of the Register,

1. *In re Bartusch*, 9 Bankruptcy Register, 478.
2. *In re Lake Superior Ship Canal, Railroad & Iron Co.*, 7 Bankruptcy Register, 378.

and is a material fact; since it is regarded as a matter of high importance, by the terms of the law, that merchants shall keep books of account from which creditors may learn their actual financial condition. I do not mean that the circumstance referred to would necessarily have weight against these claims upon further investigation, because it is a circumstance susceptible of explanation, but, at this stage of the case, the question is, whether it was not a fact, which, in connection with the other circumstances, might not create a reasonable, substantial doubt as the basis for an opinion, that the claims should be investigated by an assignee. I am not prepared to say it was not, or that the Register erroneously entertained the doubts upon which he acted in postponing these claims.

Further, I take occasion to suggest where a review by the District Judge of the action of the Register in such cases is sought, the better practice on the part of creditors who object to the postponement of claims, is, to at once have the objection entered, obtain a stay of proceedings, and have the case certified, before any further action before the Register transpires.

Inasmuch as without such objection being thus made in this case, the vote for assignee proceeded as if in submission to the ruling of the Register, even creditors who now seek this review joining in the attempted election, I doubt whether the point under consideration could be now available to the contesting creditors. I make these suggestions because of the importance of having the practice in the particular referred to, well settled and understood, as it may not have heretofore been in this court.

The bankrupt law contemplates as little delay as possible in the choice of an assignee and in his assumption of the care and management of the estate; and in this case after the appointment of the assignee, and after he had given bond and taken an assignment of the estate, and several days before the court was advised of any of the alleged irregularities in the

proceedings, license was granted to him to sell property, upon the supposition that he had been regularly chosen, a circumstance which I think illustrates the propriety of the practice I have suggested.

II. The objection to the proof of debt offered at the creditors' meeting in behalf of Elam Beardsley, is, I think, well taken. Section 5078 of the U. S. Revised Statutes provides that such proof shall be made "by the claimant, testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent, etc." The proof of this claim stated, as a reason why it was made by an agent, that the principal was traveling and was supposed to be in Colorado; and the Register held that under the words "some other good cause," in the section cited, such absence of the claimant as was shown in this proof of his demand, justified proof by an agent. I do not concur in this construction of the law. As the statute when it mentions absence of the claimant as ground for verification of the claim by an agent, speaks particularly, and only, of absence from the United States, it must be held I think, that mere absence from the state or the locality where the proof is made, is not to be regarded as alone cause for proof by an agent. The words "some other good cause," mean some sufficient cause other than or in addition to mere absence from the state. I concur in the ruling made in *In re Whyte*, 9 Bankruptcy Register, 267, in which case it was held that the absence of a claimant, which will render a proof of debt by an agent admissible, must be "from the United States." But the objection to this claim is immaterial, since it did not, and could not affect the choice or appointment of an assignee. The disallowance of it by the Register would still leave the case, so far as the choice of an assignee by vote of creditors was concerned, as it was, provided his rulings and action on the other points were right.

The result would not be changed by the exclusion of the

claim. This being so, the court ought not to set aside proceedings otherwise regular, because of irregularity in admiting this claim. [1]

III. It is claimed that the action of the Register in appointing an assignee was irregular, that there was an opposing interest, and therefore that the Register could not appoint. Section 5034 of Revised Statutes provides, that at the meeting of creditors for election of an assignee, if no choice be made, the judge, or if there be no opposing interest, the Register shall appoint one or more assignees.

By opposing interest, is meant not merely an interest contending by vote for the election of a particular person, but an interest in opposition to the exercise of the power of appointment by the Register. Upon failure to elect an assignee by creditors, it becomes the duty of the Register to state that the duty devolves upon the judge to appoint, unless there be no opposing interest. If there be no such interest, then the Register may appoint. Some misunderstanding appears to exist between counsel, and between one of the counsel and the Register, as to what transpired at the creditors' meeting. In justice to all parties I permitted in addition to the Register's certificate, oral statements as to what then transpired to be made at the hearing. The Register's certificate states that when the result of the vote showed that there had been no choice of assignee, he so announced to the creditors, and advised them that it became the duty of the judge to appoint the assignee, unless there were no opposing interests, when the Register was authorized to make the appointment; that upon inquiry of the attorney for some of the creditors, he stated that the term "opposing interest" meant opposition or objection to an appointment by the Register, and that no objection being made, he appointed the assignee. The recollection of counsel for creditors now opposing the Register's appointment, differs somewhat from

1. *In re Lake Superior Ship Canal, Railroad & Iron Co.*, 7 Bankruptcy Register, 376.

the statements of the Register's certificate, but from the statements made by counsel on both sides and by one of the contesting creditors, I must conclude that the controversy before the Register, was essentially upon the person to be chosen.

A creditor states that he thinks the Register made to the meeting the statement embodied in his certificate, and adds that according to his recollection, the attorney representing himself and other creditors now contesting the appointment made by the Register, requested or suggested the appointment of a person voted for by him, though this does not accord with counsel's understanding of what transpired.

From all the statements made, I think it a necessary inference, that specific objection was not made to an appointment by the Register. In cases where there is no choice of an assignee by creditors, distinct disclosure should be made of any opposing interest, and the Register should not appoint unless it appears beyond doubt that there is no such interest. In view of all the facts, and as no objection is made to the qualifications or integrity of the present assignee, I must confirm his appointment and set aside the stay of proceedings heretofore granted. If there should at any time arise any ground of complaint against him or his administration of the estate, creditors will have the right and opportunity to be heard.

In re WEITZEL.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1876.

IN BANKRUPTCY.

1. LUNATIC MAY BE ADJUDGED BANKRUPT.—A party under guardianship as a lunatic may be adjudged a bankrupt against the consent of his guardian.

2. LUNATIC CAN NOT COMMIT ACT OF BANKRUPTCY.—An insane person can not commit an act of bankruptcy.

This was an involuntary petition, and on the return day of the order to show cause, the respondent appeared by his guardian, and filed an answer, stating that at the time of filing the petition he was insane, and under guardianship from the county court of Crawford county, and also, that he was insane at the time the several acts of bankruptcy are charged to have been committed.

F. W. Cotzhausen, for creditor.

O. B. Thomas, for bankrupt.

HOPKINS, J.—A motion in the nature of a demurrer has been submitted, involving the questions: *First*, can a party under guardianship as a lunatic be adjudged a bankrupt against the consent of his guardian? and, *second*, can an insane person commit an act of bankruptcy?

The first is jurisdictional, and involves the power of courts, on the application of creditors, to proceed against such parties. It is not new, and may be determined by the authorities. Freeman on Judgments, section 152, says: "By a concurrence of judicial authority, lunatics are held to be

within the jurisdiction of the courts. Judgments against them are neither void nor voidable." "A lunatic may be sued at law, after the execution of the commission of lunacy." [1]

The statutes of this state authorize suits to be prosecuted against insane persons under guardianship, and prescribe the mode of service of summons in such cases. [2] That courts have jurisdiction of actions against lunatics seems to be too well settled to admit of discussion at this time.

But it is claimed that, admitting such right, it does not follow that proceedings in bankruptcy may be had. I cannot see any reason for a distinction.

Bankruptcy is a proceeding or suit in its nature equitable —a sequestration of a debtor's property that the creditors may resort to, instead of an ordinary suit at law or equity. In such proceedings there are advantages that do not pertain to other remedies known to the law. The bankrupt act declares certain acts of a preferential character void, and authorizes suits by assignees to recover back from the offending party property obtained contrary to its provisions.

It is often the only proceeding that the creditors can take to collect anything, and to hold that the remedy by ordinary action is open to them, but that proceedings in bankruptcy are not, is a discrimination between remedies not founded upon or sustained by principle or authority, as will appear by an examination of the reported cases and elementary writers on the subject. In 13 Vesey, 590, *anon*, the Lord Chancellor said: "A commission of lunacy will not protect the lunatic against an action, and a commission in bankruptcy is a species of action against which the lunacy cannot be a defense." The bankrupt act authorizes any person owing debts to be adjudged a bankrupt, either on his own petition or the petition

1. *Sternbergh vs. Schoolcraft*, 2 Barbour, 153; *Crippen vs. Culver*, 13 Barbour, 424; *Kernot vs. Norman*, 2 Term Reports, 390; *Nutt vs. Verney*, 4 do., 121; *Ibbotson vs. Lord Galway* 6 do., 133; *Ex Parte McDougal*, 12 Vesey, 385.

2. Taylor's Statutes, 1429, § 10.

of his creditors. This would not include infants and *feme coverts*, because they do not ordinarily owe debts, for want of legal capacity to contract. A party to be adjudged must have capacity to contract binding obligations. A married woman, under recent legislation in many states, now has such capacity and is liable to bankrupt proceedings. In Parsons on Contracts, vol. 3, p. 462, it is said: "If a sane person commits an act of bankruptcy and afterwards becomes insane, he may be adjudged a bankrupt and his rights protected by his guardian," and at page 461, that "if one who incurs debts and is unable to pay them, becomes a lunatic, process may now issue and the usual proceedings be had for the benefit of creditors." These cases not only ignore the existence of any distinction between remedies, but on the contrary assert the right to proceed in bankruptcy against lunatics. See Shelford on Lunatics, 429; Robsen on Bankruptcy, 94, to same effect.

Judge LOWELL, in *In re Pratt*, 6 Bankruptcy Register, 276, followed these authorities. In that case the petition was on behalf of the lunatic by his guardian, but I cannot see that that makes any difference upon the question of jurisdiction of the court.

The proceedings there were sustained upon the ground that the lunatic was a person within the meaning of the bankrupt act and amenable to proceedings in civil actions by his creditors, and if a lunatic is to be regarded as a person within the meaning of the act, the court has the same authority to entertain proceedings against him as in his favor. The act makes no distinction. Courts of bankruptcy take jurisdiction by law and not by consent of parties. The bankrupt's counsel cited and relied upon *In re Murphy*, 10 Bankruptcy Register, 48, as showing that insanity at the time of commencement of the proceedings, was a good answer. That case is very imperfectly reported, neither the reasons nor the authorities relied upon by the learned judge are given, and, as it is against the general current of the authori-

ties in this county, as well as in England, I cannot follow it as the law upon this question.

So that upon the first point, I must hold in favor of the petitioning creditors, that the proceedings are maintainable.

But the second ground alleged in the answer, if true, is fatal to the case. An insane person cannot commit an act of bankruptcy; so that if the allegation that he was insane at the time he committed the alleged acts is sustained, the proceedings must be dismissed. [1]

This seems so clear upon principle, that I do not deem it necessary to spend any more time upon it.

But the petitioners deny that he was insane at the time, which raises a question of fact which I shall submit to a jury as demanded by the respondents, reserving all further questions until that is decided.

Consult an article in American Law Register, March, 1874. "MARRIED WOMEN AS BANKRUPTS." [Reporter.

1. *In re Marvin*, 1 Dillon, 178; *Ex parte Stamp*, 1 De Gex Bankruptcy Cases, 345; *In re Pratt*, *supra*; 3 Parsons, 462.

LOUISA A. NETTLETON vs. ST. LOUIS LIFE INSURANCE COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—OCTOBER, 1876.

1. CONFLICT BETWEEN DIFFERENT CLAUSES IN LIFE INSURANCE POLICY.—Two clauses in such a policy, one "that no failure to pay any premium after the first should work a forfeiture of the entire policy, but the whole sum should be reduced in ratio to the number of premiums paid," and the other, that on failure to pay interest on unpaid policy notes, the policy should cease and determine, are not in conflict.

2. SEMBLE.—That equity might relieve.

Action on a policy of insurance issued by the St. Louis Mutual Life Insurance Company, on the 28th of July, 1866, on the life of Thomas A. Nettleton for the benefit of his wife, the plaintiff. Subsequently the St. Louis Mutual Life Insurance Company was merged into and consolidated with the defendant company, which latter company assumed all the debts and liabilities of the former, and succeeded to all its rights and franchises. The sum insured was $5,000. The first premium of $283.90 was paid when the policy issued, and that was to be followed by nine more annual premiums of a like sum. The policy was on the commutation or non-forfeiting, ten year plan, and provided for the absolute payment of the ratio of the full amount insured, upon payment annually of the premium due, and that no failure to pay any premium after the first should work a forfeiture of the entire policy, but the whole sum should be reduced in ratio to the number of premiums paid. The policy contemplated the half cash and half note system of paying premiums, and gave the company a lien on the amount due the assured for all unpaid notes taken on account of premiums. The policy also contained the following clause: "In case the said assured

shall fail to pay annually in advance the interest or any unpaid notes on loans, which may be owing by said insured to said company on account of any of the above mentioned annual premiums, or any part thereof, then, and in such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine." On the 31st day of July, 1872, the assured owed the company $737.81, on account of premiums, for which sum he gave his note at twelve months. A clause was inserted in this note pledging and hypothecating the policy for its payment. This note, upon which nothing was ever paid, continued the policy in force until the 31st day of July, 1873. The assured died on the 14th day of May, 1875.

To the complaint containing a statement of these facts the company answered, setting up the non-payment of advance interest due on the note on the 31st day of July, 1873, and the 31st day of July, 1874. The plaintiff demurred to the answer.

Hovey & Menzies, for plaintiff.

Denby & Kumler, for defendant.

GRESHAM, J.—It was insisted by the plaintiff's counsel that the interest was a mere incident to the note, and a part of it, that the parties could not have intended that the failure to pay interest on the note should forfeit the policy when neglect to pay the principal was not to have that effect; and that the interest forfeiting clause was in conflict with the provision which declared that the policy should be commuted, and not forfeited for failure to pay premiums or the principal of premium notes.

I see no conflict in the provisions of this policy. The assured expressly agreed that he would pay interest annually on all notes given on account of premiums, and that a failure so to pay interest should forfeit his policy. In the face of that clear and explicit agreement it will not do to say that the interest

was a mere incident to the note and a part of it, and that by the terms of the policy, a failure to pay premiums or premium notes was not to work a forfeiture To read this policy as if the interest forfeiting clause were not in it, would be to make a new and substantially different contract for the parties, which courts are not at liberty to do. This company did business on the mutual plan. Premiums were paid, half in cash and half in notes, and it was, of course, indispensable to provide a fund out of which losses arising from death might be promptly paid. To provide such a fund, the company's plan of business contemplated and required the investment of the cash half of its premiums and the prompt annual payment of the interest on these investments, as well as the prompt annual payment of the interest in advance on its premium notes. It is not difficult to see that the success of the company depended largely upon the annual collection of its interest. If one member might let his premium note run without paying the annual interest, all might. The company could not have long existed and paid its current death claims with this wide departure from the plan of its organization.

So far, then, from the interest forfeiting clause being in conflict with any other part of the policy, it was a wise and necessary provision. I have carefully read the opinion of the Kentucky Court of Appeals in the case of the *St. Louis Mutual Life Insurance Company vs. Grigsby*, 2 Central Law Journal, 123, upon which counsel relied with apparent confidence. In that case it was held that the policy was hypothecated for the payment of the note and interest, and that the company was amply secured. Although this decision comes from a court of great respectability, for the reasons already given, I can not follow it.

In the case at bar, when the assured died, two years interest was due and unpaid on the note given for $737.81. It does not appear from the pleadings that the policy was entitled to any dividend in the hands of the company. In the

Grigsby case the dividends due the assured were equal to the interest due on the premium note, less $6.97. I do not say that a court of equity would not be justified in relieving a party from forfeiture under such circumstances.

To have forfeited the policy in that case, when the premium in the hands of the company due the assured was within $6.97 of being enough to pay the interest due on the note, would seem to have been against conscience, but the decision was based upon other grounds. Courts of equity sometimes "relieve against forfeiture when the amount is greatly disproportionate, and the forfeiture is designed as mere security so that full compensation can be made." [1]

The demurrer is overruled.

HENRY D. BASSETT, Surviving Partner, Etc., vs. HUNTER ORR *et al.*

Circuit Court.—Eastern District of Wisconsin.—October, 1876.

In Equity.

1. Creditor's Bill.—If it is apparent that there was no *bona fide* attempt made by the officer to find property to satisfy the judgment, a creditor's bill will be dismissed.

2. As the basis for a creditor's bill, an execution upon the judgment should be in good faith issued, and should be returned unsatisfied by the officer upon a reasonable and actual but ineffectual effort to find property. If the return of the officer on its face shows a failure in this respect then there is no foundation for equity jurisdiction.

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1. Story's Equity Jurisprudence, §§ 1314, 1316.

3. The Marshal is not bound to hold the execution the sixty days it might run before making a return, as the remedy at law might be exhausted before the expiration of the return day, and in that case the execution could be immediately returned.

4. RETURN OF MARSHAL PRESUMED TRUE.—When the return of the Marshal is on its face complete and sufficient, the presumption is that the return is true and that the officer performed his duty; such presumption is not overcome by the fact that he returned the process on the day he received it, as he might have previous knowledge of the judgment debtor's property and situation.

5. BURDEN OF PROOF.—The burden of showing the return false is upon the defendant.

6. The return is a sufficient basis for a creditor's bill.

7. EVIDENCE.—The falsity of the return may be shown by establishing that the debtor had property liable to execution and which could have been levied on to pay the debt.

8. AMOUNT OF PROPERTY.—It is not necessary that there should be property sufficient to fully satisfy the execution in order to defeat the remedy in equity, and if there be property sufficient to satisfy a considerable portion of the debt a creditor's bill ought not to be sustained until such property is exhausted.

9. In this case, property being mortgaged and defendant's affairs complicated, the bill was sustained.

The complainants recovered a judgment against the defendant Hunter Orr, in this court April 15th, 1875. Execution was issued upon the judgment and delivered to the Marshal April 16th, 1875, and was returned by him on the same day *nulla bona*. The defendant's residence was at Oconto, in this state. On the 17th of April the complainants commenced this action against the judgment debtor, and other parties, which was in the form of a creditor's bill, to reach property for the satisfaction of the judgment. A Receiver was appointed in the action April 29th, and an injunction was issued and served November 6th, 1875. The bill was in the usual form.

Defendants pleaded, averring that the Marshal made no attempt to find property from which to make the amount of the execution issued upon the judgment, and that he returned the execution without any effort to discover or levy upon property; that the judgment debtor at the time owned

property consisting of lands and a saw mill, in the county of Oconto, of value more than sufficient to satisfy the judgment and execution.

Upon the issue thus made, and the testimony, the defendants insisted that the bill should be dismissed.

Tenneys, Flower & Abercrombie, for complainants, cited *First National Bank vs. Gage*, 8 Chicago *Legal News*, 370.

John J. Tracy, for defendant, Orr; with whom was *H. M. Finch*, who cited *Gibson vs. Woodworth*, 8 Paige Chancery, 131; *McElwain vs. Willis*, 9 Wendell, 549; *Smith vs. Thomson*, 1 Walker's Chancery, 1; *In re Remington*, 7 Wisconsin, 643; *Reed vs. Wheaton*, 7 Paige, 664; *Voorhees vs. Howard*, 43 New York, 371; *Crippen vs. Hudson*, 3 Kernan, 161; *Cassidy vs. Meacham*, 3 Paige, 311; *Riopelle vs. Doellner*, 26 Michigan, 102.

DYER, J.—To permit a judgment creditor to issue an execution upon his judgment, and to procure its immediate return, "no property found," when in fact no effort whatever had been made by the officer to find property, and when in fact the debtor had tangible, visible property from which the amount of the judgment could be realized, and then to suffer the creditor to make such proceedings the basis of a creditor's bill, would be a perversion of the plainest principles of equity practice applicable to the subject. Upon such a state of facts being shown, I should not hesitate to dismiss the bill.

In this case it is claimed:

I. That it is apparent on the face of the Marshal's return, considered in connection with the dates of the entry of judgment, of the issuance of execution, of the return itself, and of the filing of this bill, that there was no *bona fide* attempt made by the officer to find property.

II. That upon the testimony the court should conclude

that the Marshal was directed by the creditor to return the execution, "nothing found," without any effort to discover property.

III. That to lay the basis for a creditor's bill the execution should not have been returned until the return day thereof, and that by its terms the officer had sixty days within which to look for property and to return the execution.

IV. That the judgment debtor owned visible property upon which the judgment was a lien and from which the amount of the judgment could have been made at the time the execution was returned.

It is insisted either that the bill should be dismissed, or that all proceedings subsequent to the filing of the bill should be set aside, and the bill be entertained only in aid of the execution.

The testimony taken upon the issue formed by the bill and plea, hardly warrants the conclusion that the execution was returned by the Marshal, "no property found," under direction of the judgment creditor's attorneys so to make return. The only testimony upon that subject is that of Mr. Tenney, one of the attorneys, who testifies that he presumes the Marshal was instructed to make such a return in case he found he could collect nothing, and that he supposes the Marshal made his return as it was made, because he was satisfied he could make nothing by levy.

I do not think the Marshal was bound to hold the execution the sixty days it might run, before making a return. In other words, the remedy at law might be exhausted before the expiration of the return day, and in that case the execution could be immediately returned. There are cases to the contrary in New York, but they arose and were decided upon ancient statutes of that state. The cases cited upon the argument, *Smith and Willard vs. Thompson*, 1 Walker's Chancery Reports, 1, and: *First National Bank vs. Gage*, 8 Chicago *Legal News*, 370, are in antagonism upon

the point. The practice sanctioned by the courts of this state is against the theory that a creditor's bill cannot be filed until after the return day of an execution, although the execution should be actually returned before that time. The test is, and I think should be, has the remedy at law been exhausted before the exhibiting of the bill; and I understand that in this court under the established practice, such a bill may be presented, though the execution be in fact returned before the return day, if the bill is otherwise within the equity rules.

As the basis for a creditor's bill, an execution upon the judgment should be in good faith issued, and should be returned unsatisfied by the officer after a reasonable and actual but ineffectual effort to find property. In other words, the remedy under the execution should first be exhausted. If the return of the officer on its face shows a failure in this respect then there is no foundation for equity jurisdiction. As in the case of *In re Remington*, 7 Wisconsin, 643, cited on the argument, where the officer made return by order of the attorney and returned only that there was no personal property whereon to levy, which was held insufficient to support proceedings in the nature of a creditor's bill. If there be collusion between the officer and the party and a false return is made, proof of the fact is of course fatal to a bill. Here the return of the Marshal is on its face complete and sufficient. The presumption is that the return is true. The presumption is that the officer performed his duty. That presumption is not overcome by the fact that he returned the process on the day he received it. We do not know but that on some other process, or by some other means, he had previously had occasion to investigate, and had acquired knowledge of the judgment debtor's property and situation. In any event we have to presume the return true until the contrary is shown, and the burden of showing the return false is upon the defendant. Unattacked, and supported by this presumption, the return is a sufficient basis for a creditor's bill. Its

falsity may however be shown by establishing the fact that the debtor had property liable to execution, and which could have been levied on to pay the debt. Such fact should be clearly and satisfactorily shown. In such event a creditor's bill could not be maintained. I do not regard it essential that there should be property sufficient to fully satify the execution in order to defeat the remedy in equity. If there be property sufficient to satisfy a considerable part of the debt, a creditor's bill ought not to be sustained until such property is exhausted.

The remaining question then is, does it clearly and satisfactorily appear from the testimony that the judgment debtor had tangible property and effects, real or personal, from which the debt or a considerable part of it could be realized. The defendant testifies that he owns a quantity of pine lands from which the timber has been cut off, and the amount and value of which he does not state, but which lands are incumbered by mortgage to the extent of between four and five thousand dollars. Then the firm of Hunter, Orr & Co. owned a saw mill standing on leased land. The defendant Orr testified that the mill cost $22,000. In November, 1875, there was rent unpaid for the leased land amounting to about $700, and also some taxes. The yearly rent agreed to be paid was $600 or $700. In April, 1875, the mill was let to the sons of the defendant Orr, his firm having previously discontinued business; but those lessees in November, 1875, had paid no rent for the use of the mill. There was a judgment in favor of one Somers against Orr, upon which there was originally due about $5,200, but which had been reduced by levy and sale of property, to about $3,000; and for the payment of which the property of Orr seems to have been liable. Then Blanchard, Borland & Co., of Chicago, held a transfer of defendant's interest in the mill and leasehold, as security for a balance due to them on account of advances. Mr. Blanchard testifies that the value of the mill was much affected by the fact that it stood on leased lands, that there was a large

amount of the rental and taxes unpaid, and that the owner of the lands would not permit the removal of the mill. With permission to remove the mill and after paying all delinquent taxes and rents, and securing the payment of the rent for the term of the lease, he thinks the mill might have been sold for between $3,000 and $4,000. Viewing the property just as it stood in April, 1875, and without special reservations touching removal of the mill, and payment of taxes and rent, he does not think the property had any salable value. Considering all the evidence bearing upon the circumstances of the judgment debtor, the character, value and situation of his property and the incumbrances upon the same, it is by no means clear that any part of the complainants judgment could have been realized by ordinary proceedings upon the execution.

The testimony taken as to property possessed by the defendant, tends to the conclusion that there is slight basis, if any, so far as property is concerned, for a creditor's bill. The plea will be overruled as a plea, and as it presents the only issue in the case which the defendants seek to raise, it may stand as an answer to the bill, with the right to the parties of bringing forward all the merits of the case.

In re HUGO BROICH, LOUIS KURZ AND JOHN KREMER.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1876.

IN BANKRUPTCY.

1. SECURED CLAIM.—An indorsed promissory note is not a secured claim within the meaning of § 5075 of the Bankrupt Act.

2. LIEN.—A creditor seizing property under process of attachment issued from the state court within four months prior to the commencement of bankruptcy proceedings, is not considered as having a secured claim, and may be counted in estimating the number and amount of the creditors of the bankrupt.

3. Such a creditor has only an inchoate, conditional lien, and not a fixed, absolute, vested and continuing one, as intended by the statute.

4. COMPUTING NUMBER AND AMOUNT.—In computing the number of creditors who shall join in the petition, creditors whose debts do not exceed two hundred and fifty dollars shall not be reckoned; but in computing the amount or value, all claims should be included regardless of amount.

5. Where an indorsee of a note proved up his claim against the estate of the makers, and afterwards and during the pendency of the bankruptcy proceedings received payment from the indorser, his relation to the liability ceases, he is no longer a creditor of the makers, and all claim against the makers, so far as he is concerned, is extinguished, and consequently he can take no further part in the proceedings. The indorser becomes subrogated to his rights, and the demand becomes one in favor of the indorser alone against the makers.

6. WAIVER.—The act of joining in a creditors' petition by a secured creditor, without reference to the security, is a waiver of such security.

7. The transfer to one of the creditors of a bankrupt, of the book accounts within two months of commencement of proceedings, is not presumptively a fraudulent preference.

On the 10th day of April, 1876, proceedings in involuntary bankruptcy were instituted against the debtors, who composed the firm of Broich & Co.

The petitioning creditors were three in number, as follows:

Fette & Meyer, whose claims were stated in the petition as amounting to $327.24, M. S. Cotzhausen, representing $842.18, and N. B. Caswell, a creditor to the amount of $800. The aggregate of these debts being $1,969.42.

The debtors made no answer to the petition, but C. H. Hamilton & Co., as attaching creditors, answered, denying that the requisite number of creditors had joined in the petition, or that the requisite amount of provable debts were represented therein; and further charging that the proceedings were collusively begun.

Upon this answer, an order of reference was made to the Register, to take testimony, and the debtors were ordered to file a verified list of their creditors and of all debts against them. Pursuant to this order, testimony was taken and such list was filed. This list named six creditors, each representing claims over $250, such creditors holding, as it was alleged, indebtedness aggregating $12,823.22. The total number of creditors named in the list, including all who held demands in any amount, was sixty-three, and the total amount of indebtedness as stated in the list, was $16,472.14.

Upon the showing thus made on the face of the debtors' list, counting only creditors named therein as holding demands over $250, the court held that the aggregate debts of the petitioning creditors did not amount to one-third of the provable debts of the debtors, and granted ten day's time within which other creditors might join in the petition. On the 3d day of August, Mrs. Hedwig Broich, wife of Hugo Broich, one of the debtors, made application to join in the creditors' petition, as a creditor to the amount of $1,746.93, principal and interest. Her claim was stated in the debtors' list, which was filed April 21, at $1,662.50.

Alexander V. Cotzhausen also made a similar application, in which he set forth a demand for $4,000, with interest at ten per cent. from the 16th of September, 1875, against the debtors; which demand was included in the debtors' list, and was founded upon a promissory note made by the debtors,

dated September 16th, 1875, payable to the order of Valentine Blatz, on the 1st day of July, 1876, and indorsed by Valentine Blatz and F. W. Cotzhausen. Accompanying this application, which was in the form of an affidavit, was a proof of the claim made before the Register. Both the affidavit and proof were sworn to before the Register, June 23d, 1876, but neither had been filed or presented to the court for any action thereon, until the present hearing. The note thus presented as a claim against the debtors, and held by Alexander V. Cotzhausen, had been, when due, and pending the present proceedings, viz: on the 3d of July, 1876, paid to the holder by the indorser, Valentine Blatz.

Resistance was made by the attaching creditors to the admissibility of these claims presented by Mrs. Hedwig Broich and Alexander V. Cotzhausen and to the application of those parties to join in the creditors' petition; and these, with other questions, various in character, arising in the case, are considered in the opinion of the court.

Cotzhausen, Smith, Sylvester & Scheiber, for petitioning creditors.

J. J. Orton and *Jas. G. Jenkins*, for attaching creditors.

DYER, J.—This controversy, which is between petitioning and attaching creditors, and which originated in a denial that the debts represented by the petitioning creditors amount to one-third of all of the provable debts of the debtors, presents a variety of interesting and important questions. In proceeding to dispose of them, I may not adhere to the order in which they were argued.

I. At one stage of the case, the petitioning creditors raised the point as to whether the demand of $4,000, described in the debtors' list as held by Alex. V. Cotzhausen, should be counted, in ascertaining the amount of the debtors' provable debts. That demand is in the form of a promissory note, made by the debtors: and, being indorsed by Valentine Blatz,

the suggestion was made that it was a secured claim. I held otherwise, and now re-affirm that ruling. Section 5075 of the Revised Statutes clearly declares what shall be a secured debt within the meaning of the bankrupt law. The security must be in the form of a mortgage or pledge or lien on the property of the bankrupt.

Security in the shape of an indorsement or guaranty of a third person, is not within the meaning of the section cited. This question is so thoroughly discussed and well decided by Judge HOPKINS, of the Western District of this state, in *In re Anderson*, *ante* p. 233, that further consideration of it is unnecessary.

II. It is insisted in behalf of the petitioning creditors, that the claims of Hamilton & Co., ought not to be counted as provable debts, because, before the filing of the petition in bankruptcy, they had commenced attachment proceedings against the debtors, which were then pending in the state court, had seized personal property under their attachment, and that these claims became thereby secured. In the case of *Hatje*, 6 Bissell, 436, in disposing of the main question there involved, I treated the demands of attaching creditors as provable debts to be included in ascertaining the amount of indebtedness that should be represented in a creditors' petition. The precise question we have here, was not, however, discussed in that case. In another case in this district, unreported, *In re Cole*, attaching creditors joined in a petition for adjudication. It was urged that they were lien-holding creditors, and could not, therefore, be counted among those holding provable debts under the provisions as to number and amount in the amendment of 1874. I held the contrary and sustained their right to file a petition for adjudication. Regarding the claims of such creditors, as secured, that ruling was sanctioned by well settled adjudications that even secured creditors may file such petition, and that the act of doing so, without reference to lien or security, is a waiver and relinquishment of such lien;

the creditor then standing before the court as unsecured.[1]

The two cases referred to, thus involved in some phases, the question we have here, but as it is now directly presented as an independent proposition, I shall treat it as an original question in this court. It has been held that secured creditors are not to be reckoned among those who constitute the requisite number, and represent the requisite amount under the amended 39th section of the act. Judge BLODGETT, in a very clear and satisfactory opinion *In re Frost, supra*, has so decided.

He points out the mode in which a secured creditor may prove his debt; holding, that such debt is provable only on condition that the security is surrendered or exhausted; which condition "can only be performed after there is an assignee to whom the surrender of security can be made, or by a sale of the property as the court shall direct, both of which contingencies can only occur after the debtor is adjudged bankrupt, or at least after the court has taken jurisdiction of the subject matter."

Admitting that a lien-holding creditor may petition for adjudication against his debtor, there yet exists in such case, the condition of surrender or loss of security; and his conclusion is, that by the use of the term "debts provable under this act," used in the amended 39th section, Congress meant debts unconditionally provable without any release of security or other preliminary action by the court or assignee. This ruling has been followed *In re Green Pond Railroad Co.*, 13 Bankruptcy Register, 118.

In the category of secured creditors stands also the preferred creditor, with reference to provability of his debt.[2]

Now, the question is, Does a creditor seizing property under process of attachment, issued from the state court within four

1. *In re Bloss*, 4 Bankruptcy Register, 147; *In re Stansell*, 6 Bankruptcy Register, 183; *In re Frost*, 6 Bissell, 213.

2. §§ 5021 5084 U. S. Revised Statutes; *In re Currier*, 13 Bankruptcy Register, 68.

months prior to the commencement of bankruptcy proceedings, stand in the rank of secured creditors mentioned in section 5075 Revised Statutes?

Of what character of lien does that section speak? I think the lien there contemplated, is one that is fixed, absolute, vested, continuing. A lien by attachment is not inherently of that character, even under the state statute. Emphatically not under the bankrupt law. True, that an attachment is a proceeding by which a creditor may ultimately secure payment of his debt from particular property, and so in a certain sense gives a lien on or a right to follow the property attached. But it is inchoate, conditional in its character. Springing as it does from legal proceedings, it is liable to be defeated at the very next step in those proceedings, under procedure pointed out by the state statute. It is not a lien ripened into fixed, vested security, such as is created by contract between parties or final judgment of a court. An attachment is in its nature *mesne* process; a judgment and execution are the final action and process of the court and perfect, complete that which up to that point was in progress and contingent. Herein, I think, lies a distinction between the cases of a so-called attachment lien, and a judgment or execution lien, referred to by counsel on the argument.

Further, the bankrupt law declares that upon adjudication and assignment of the estate, all attachments issued within four months before the commencement of bankruptcy proceedings are dissolved. The effect of this is, to destroy the lien or preference created by an attachment issued within a certain period, the intent of the law being to place such an attaching creditor on the basis of unsecured creditors. Can it be maintained then, that a creditor, whose lien thus acquired may be terminated, taken wholly away by the bankruptcy, must be excluded as a secured creditor from the rank of creditors to be counted in estimating number and amount under the amended 39th section?

In my judgment, it cannot. The lien should be one con-

tinuing, notwithstanding bankruptcy, not destroyed by it. It may be added, that to exclude attaching creditors from the list of those who are to be reckoned in ascertaining whether the requisite number have joined in a petition and whether the requisite amount of debts is represented therein, would seem inconsistent with the ruling that attaching creditors, as parties holding provable debts, may intervene and contest adjudication; and the latter proposition has become emphatically settled in the affirmative. The views I have expressed, concur with those stated by Judge FOSTER, *In re Scraffard*, 14 Bankruptcy Register, 184, and my conclusion upon this point is, that the demand of Hamilton & Co., should be included in ascertaining the amount of the debtors' provable debts.

III. It is claimed by the attaching creditors, that in computing the amount of provable debts that must be represented in the creditors' petition, creditors holding claims under as well as over two hundred and fifty dollars, should be included. Upon this point, there are two leading decisions, directly in conflict, Judge BLATCHFORD having held the negative, and Judge BROWN the affirmative of the proposition, *In re Hymes*, 10 Bankruptcy Register, 434; *In re Hadley*, 12 Bankruptcy Register, 366. I have read these decisions and examined the statutory provisions upon the point, with care, and regard the reasoning of Judge BROWN as conclusive. His ruling has been followed by Judge LOWELL, *In re Currier*, 13 Bankruptcy Register, 68, and by Judge WALKER, *In re Woodford & Chamberlain*, 13 Bankruptcy Register, 575. Upon an examination of the various provisions of the bank rupt law bearing on the subject, I do not see how it can be doubted that Congress intended that, in computing the number of creditors who shall join in a petition, creditors whose debts do not exceed two hundred and fifty dollars should not be reckoned; but that in computing the amount or value, all claims should be included regardless of amount.

IV. One of the items of indebtedness stated in the debtors

list, is a demand of $4,000, in favor of Alex. V. Cotzhausen. This demand is in the form of a promissory note, dated Sept. 18th, 1875, made by the debtors, due July 1st, 1876, payable to the order of Valentine Blatz, and indorsed by him. This note, at the time bankruptcy proceeding were commenced and subsequently, was held by Alex. V. Cotzhausen. On the 23d of June, 1876, he verified proof of the claim before the Register, and on the same day made and verified before that officer a further statement of the demand, as a basis for joining in the creditors' petition. This proof and statement were not, however, filed or presented for any action thereon by the court, until the hearing of this case in August, when application was made by the claimant, Cotzhausen, to join in the petition. On the 3d of July, 1876 and during the pendency of these proceedings, he received from Blatz, the indorser, the full amount due on the note.

It is insisted, notwithstanding this payment, that the demand may properly be presented by Cotzhausen, as a claim against the debtors, and that as a creditor he should be permitted to join in the creditors' petition, though Blatz does not participate in such application, and is understood not to consent to the same. The position thus taken upon this question, is supported in argument by the theory, that the day when a petition in bankruptcy is filed, is the time when the *status* of creditors is fixed, and that if a claim is at that time valid, it must be recognized as such throughout the subsequent proceedings, notwithstanding change occurring in the position of the claim, or in the relations of the creditors to the debtors or their estate. It is true that the rights of parties are ordinarily to be considered upon the footing which they held at the time of the commencement of proceedings. It has been the view of some judges, that it was the intention of the law to adopt the time of adjudication as the time at which a debt must exist, in order to be provable; by others, that the time when the petition for adjudication is

filed, controls in the particular named.[1] It may be admitted, that the *status* of parties as it was when proceedings were commenced, is, as a rule, to control in subsequently settling their rights; nevertheless, I do not understand the principle to extend to the length of preserving to a party the character of creditor, when that character has been voluntarily surrendered, and has actually ceased.

Here, the indorsee of a note, holding the liability of both makers and indorser, during the pendency of proceedings against the makers, voluntarily receives payment from the indorser. Can it be said that, because he was a creditor at the filing of the petition, he continues a creditor, or can hold the position of creditor, for any purpose, notwithstanding such payment? I regard the question as free from all doubt. When the indorsee received payment from the indorser, his relation to the liability, ceased. He was no longer a creditor of the makers. All claim against the makers, so far as he was concerned, was extinguished. The indorser became subrogated to his rights, and the demand became one in favor of the indorser alone against the makers. The only party who could then assert the claim against the debtors, and in whose name and at whose will it could be presented as the basis for an application to join in these proceedings, was the indorser Blatz. If he does not now present the claim and as a creditor ask leave to join in a creditors' petition, I do not think the indorsee, now paid by the indorser, can. Nor do I regard the circumstance, that verification or proof of the claim had been made by Cotzhausen before he received payment, and that delay occurred in disposing of the present issue in this case as affecting the question. Such proof of claim was not filed and no action of the court was sought upon it, until after the payment was made. The fact of payment by the indorser, and of voluntary acceptance of the

1. *In re Hennocksburgh & Block*, 7 Bankruptcy Register, 37; *In re Crawford*, 3 Bankruptcy Register, 698.

money by the holder of the note, is necessarily controlling, and must deprive the present claimant of recognition as a creditor in these proceedings. As bearing on this question, see, *In re Montgomery*, 3 Bankruptcy Register, 426; *In re Brown*, 3 Bankruptcy Register, 584, where it was held that a creditor might prove a claim based on a debt existing at the time of proceedings commenced in bankruptcy, notwithstanding he had after adjudication, recovered a judgment on the demand. But that was on the ground that the identical debt in favor of such creditor, remained, and was not extinguished by the judgment.

There are cases where an indorser had made partial payment to the holder of the note, and such holder was permitted to make proof of the whole amount in his own name.[1] But in these cases, the holder of the paper was still a creditor; still a party in interest, because he had been but partially paid, and the proof was allowed for his benefit, to the extent of his interest, and for the indorser's benefit, to the extent of his payment. The dissimilarity between this class of cases and the case at bar, is apparent.

The application of Alex. V. Cotzhausen to join in the creditors' petition must be denied.

V. The claim of Mrs. Hedwig Broich for $1,662.50 included in the debtors' list, will be recognized, and her application to join in the creditors' petition will be granted. Upon the testimony, I think that claim one that should be included among the liabilities of the debtors.

VI. It is insisted also, by the attaching creditors, that the claim held by N. B. Caswell, who is one of the petitioning creditors, is secured, and ought not to be counted in the present estimate of indebtedness. He was the lessor of the premises occupied by the debtors in carrying on their business. The lease contained a clause by which the lessees conditionally transferred to the lessor, certain personal property on the

1. *In re Ellerhorst & Co.*, 5 Bankruptcy Register, 144; *Downing, Assignee, vs. Traders Bank*, 11 Bankruptcy Register, 372.

premises as security for the rent. If this was a valid security, it has been waived by Caswell. The act of joining in a creditors' petition without reference to security is such waiver.

VII. It is further claimed that $359.45 should be added to the claim of Hamilton & Co., as scheduled, for interest, etc.; that $84.43 should be added to the claim of Mrs. Hedwig Broich, and $129 to that of Valentine Blatz.

Allowance of interest should be on the basis of equality toward all creditors. Interest on one claim should therefore stop simultaneously with that on another. This being a proceeding that precedes adjudication, and that involves the ascertainment of all provable debts, it is equitable that interest on all claims drawing interest should stop for purposes of this proceeding, when the petition was filed, April 10th, 1876. Interest will be computed on this basis. If any part of the $359.45, which it is said should be added to the demand of Hamilton & Co., consists of costs incurred in the attachment proceeding, they must be excluded. *In re Hatje, supra.* Whatever Valentine Blatz received from the debtors, to be applied on the $4,000 note indorsed by him, should be deducted from the amount due thereon for principal and interest, April 10th, 1876, when the petition in bankruptcy was filed.

VIII. Valentine Blatz is named in the debtors' list as a judgment creditor to the amount of $3,833.50, and it is insisted by petitioning creditors that he holds security for this demand, and therefore should not be reckoned in the computation now required in this proceeding. It appears that on the 13th of February, 1876, less than two months prior to the filing of the petition in this case, Broich & Co., to secure the payment of the judgment in favor of Blatz, executed in writing a transfer to him of all book accounts and outstanding demands in favor of the firm. There was no actual delivery to the judgment creditor of these transferred demands and choses in action, and they have ever since been in

the hands of other parties than the transferee, Blatz. But he claims them as fully transferred to him for security, and in this proceeding, insists upon his right to them. This being so, I think that as to his judgment, he must to a limited extent, as hereafter indicated, be regarded as a secured creditor.

The aggregate amount of the transferred demands and accounts is $3,750. From the testimony it would appear, that at the time of the transfer, they were worth about fifty cents on the dollar. This was their value as nearly as they can be arrived at, from the evidence on the subject. This value would amount in figures to $1,875.

In the case of *California & Pacific R. R. Co.*, 11 Bankruptcy Register, 193, it was held that the court may, at this stage of proceedings inquire into and determine what is the value of securities held by creditors, in order to ascertain whether the claims of petitioning creditors are of the amount required by the statute. Following the rule adopted in that case, and finding the value of the securities assigned to Blatz, at the time of the transfer to be $1,875, I deduct that amount from the amount due on his judgment when the petition in bankruptcy was filed, April 10th, 1876, and treat the balance $1,875, is unsecured, and is an amount to be reckoned and included in estimating the debtors unsecured, provable debts, when the petition was filed. The attaching creditors have urged that the transfer by the debtors to Blatz, of their accounts and demands as security, should be treated as a fraudulent preference and void, and so that the judgment held by Blatz should be regarded as wholly unsecured. But to make that transfer a fraudulent preference, it must be shown that the debtors were at the time insolvent, or contemplated insolvency; that they made the transfer with a view to giving a preference, and that the transferee, Blatz, had reasonable cause to believe that Broich & Co. were insolvent, and knew that the transfer was made in fraud of

the provisions of the bankruptcy law, which facts, if they exist, do not yet appear, and cannot be now assumed, in order to defeat the transfer.

WILMER S. LAMB, Assignee, Etc., vs. BARTON BOWSER.

Circuit Court.—District of Indiana.—December, 1876.

1. Lex Loci Contractus.—Where an application for insurance on certain property, and a note and sum of money, that constituted the premium, were sent from Indiana, by an agent of the company to the home office in Illinois, and were examined and accepted by the proper officer; Held, that the contract was made in Illinois and must be governed by the law of that state.

2. The fact that the company and its agent had not complied with the Indiana statute does not invalidate the policy.

3. Constitutional Law.—It is not competent for the legislature of one state to declare that its citizens shall not be allowed to make such contracts as they please, out of the state.

This was an action brought by the assignee of the Winnesheik Insurance Company on a premium note.

The answer alleged that the Winnesheik Insurance Company was organized under the laws of Illinois; that the defendant delivered to the agent of the company, in Noble county, Indiana, where the defendant resided, an application for insurance on certain property in that county, and the said note and a certain sum of money, which note and money constituted the premium; that said agent forwarded said application, note and money to the company's place of business at Freeport, in the state of Illinois, and caused a policy of insurance to be delivered to the defendant at said county of

Noble, all of which was done by said company and agent without first having complied with an act of the legislature of this state respecting foreign corporations and their agents doing business in this state.

The reply admitted that the application and premium note were delivered to the agent in Noble county, and by him forwarded to the company's usual place of business, at Freeport, Illinois, and then alleged that the authority of the agent extended no further than the taking of the application and premium notes and forwarding them to the home office at Freeport, to be examined and acted upon by the company; that the application and premium note in this cause were examined by the proper officer of the company at Freeport, and by him there approved and accepted, and a policy of insurance on the property described in the application, properly made out and executed, was then and there inclosed in an envelope, addressed to the defendant at his residence in said Noble county, and deposited in the mail at Freeport, postpaid.

To this reply the defendant demurred.

McDonald & Butler, for plaintiff.

Harrison, Hines & Miller, for defendant.

GRESHAM, J.—The first section of the act relied on by the defendant provides that agents of foreign corporations, before entering on the duties of their agency in this state, shall deposit in the clerk's office of the county where they propose doing business, the power of attorney or other authority by virtue of which they act as agents.

The second section provides that said agents shall procure from such corporation, and file with the clerk of the Circuit Court of the county where they propose doing business, before commencing the duties thereof, a duly authenticated order or resolution of the board of directors or managers of such corporation, authorizing citizens or residents of this

state, having a claim or demand against such corporation arising out of any transaction in this state with such agents, to maintain an action in respect to the same in any court of this state, and authorizing service of process in such action on such agent, to be valid service on such corporation.

The third section provides that service on such agents shall have the same effect as service on the corporation.

The fourth section provides that such foreign corporations shall not enforce in any courts of this state any contracts made by their agents or persons assuming to act as their agents, before compliance by such agents or persons acting as such, with the provisions of sections one and two of this act.

The fifth section provides that any persons who shall receive or transmit money or anything else of value to or for the use of such corporation, or who shall in any manner make or cause to be made any contract or transact any business for or on account of any such foreign corporation shall be deemed an agent of such corporation and subject to the provisions of said act. The seventh section provides that any persons acting as agents of foreign corporations neglecting or refusing to comply with the provisions of said act as to agents shall be fined in any sum not less than fifty dollars.

When the company accepted the application and premium note at Freeport, and deposited the policy of insurance in the post-office addressed to the defendant, post-paid, the contract was complete and the note became the binding obligation of the defendant. Then, and not before, the minds of the parties met. Up to that time neither party was bound. Before that time the defendant might have withdrawn his application and demanded the return of his note. The mailing of the policy at Freeport was a delivery to the defendant. The instant that delivery was thus made the risk of the company as insurer commenced. [1]

The Winnesheik Insurance Company, being a foreign cor-

1. *Hyde vs. Goodnow*, 3 Comstock, 266.

poration, could act in this state only by agents, and agents of such corporations being expressly prohibited by the statute from making any contracts, or transacting any ordinary business in this state except as therein provided, it would seem that the company, as well as the agent, acted in violation of law in establishing the agency in Noble county, and in taking and forwarding the application and premium note. [1]

And for thus violating the law of the state the agent might have been prosecuted and punished. But it does not follow that, because the company and its agents thus violated the law of Indiana, the contract entered into in Illinois was illegal and void. The case stands just as if the defendant had procured his insurance on personal application to the company at Freeport. But the defendant insists that even if this is to be regarded as an Illinois contract, it was entered into in violation of the Indiana statute, and can not therefore be enforced in this state. In answer to this it might be sufficient to say that it is not competent for the legislature of Indiana to declare that the citizens of this state shall not be allowed to make such contracts as they please out of the state for the insurance of their property, whether it be within or without the state. It by no means follows that, because corporations have no existence beyond the boundaries of the sovereignty or state which creates them, and Indiana has said that foreign corporations shall be admitted to do business in this state only on certain terms, which were not complied with by the Winnesheik Insurance Company, the contract in this case, made in Illinois, is void.

Clearly it was not the intent of the legislature to apply this statute to contracts entered into with corporations out of the state. The title of the act reads: "An act respecting foreign corporations and their agents in this state." In the first section, in speaking of what shall be required of agents, we

1. *Union Central Life Insurance Company vs. Thomas*, 46 Indiana, 44; *Ætna Insurance Company vs. Harvey*, 11 Wisconsin, 394.

find this language: "Before entering upon the duties of their agency in this state." The second section provides that the appointment or power of attorney of such agents shall authorize the citizens or residents of this state having a claim or demand on such corporation arising out of any transaction in this state with such agents to sue, etc.

Section four provides that "such foreign corporations shall not enforce in the courts of this state any contracts made by their agents before a compliance made by such agents with the provisions of sections one and two of this act."

It is further insisted by the defendant that no country or state is bound to enforce contracts which are contrary to the policy of its own laws, and that even if the contract was finally consummated in Illinois, it was not until the statute of Indiana had been violated, and that what was done in Illinois was in evasion if not in violation of the statute.

This contract was valid in Illinois where it was made. The rule is that a contract which is good where made is good everywhere, and a contract which is void by the law of the place where it is made, or of the place where it is to be performed, is void everywhere. [1]

As already shown, the defendant's contract with the company was not in violation of the statute. Its enforcement here would contravene no declared policy of the state, and certainly it was not immoral in itself.

The law of comity, which has always been recognized to the fullest extent among the states of our Union, makes it the duty of courts to enforce such contracts.

There is nothing in the legislation of Indiana indicating that this law of comity is not to have full sway in the courts of this state. By that law a corporation created by one sovereign or state is permitted to make contracts in another and to sue in its courts. Indiana has said, as she had a right

1. *Hyde vs. Goodnow*, 3 Comyn., 266.

to say, that before foreign corporations shall be allowed to carry on business in this state, by their agents, they shall submit to certain conditions, and that failure to submit shall make void all contracts of their agents made in this state.

Further than this, the legislature has not undertaken to go.

The case of *Reynolds vs. Geary*, 26 Connecticut, 179, which seemed to be chiefly relied on by the defendant's counsel in support of this branch of their argument, was an action brought on a note given by the defendant to the plaintiff for spirituous liquors sold by the plaintiff to the defendant. The note was given in the city of New York, and the sale was made there with knowledge on the part of the plaintiff that the liquors were to be sold by defendant in Connecticut, contrary to the laws of that state, and with intent on the part of the plaintiff to enable the defendant to violate the laws.

The statute which was thus violated declared that "no action of any kind shall be maintained in any court of this state, for spirituous and intoxicating liquors sold in any other state or country contrary to the laws of said state or country, or with intent to enable any person to violate any provisions of this act."

The court held that mere knowledge of the plaintiff that the liquors were bought for sale in Connecticut would not have made the note void, but that the intent on the part of the plaintiff that, with his assistance, the defendant should violate the statutes, made the plaintiff *particeps criminis*.

I am not able to see that this case affords the defendant any support. The sale of spirituous liquors in New York with intent on the part of the seller to enable the purchaser to violate the law brought the contract within the letter of the act. It is not necessary to enlarge upon the character of this Connecticut statute as a police regulation for the protection of the public health and morals. The distinction in that respect between it and the kind of legislation relied on by the defense is obvious. Demurrer overruled.

This case was argued before Judge DRUMMOND on appeal, and after careful examination of the questions, the rulings of the District Judge were affirmed. See *Lamb vs. Bowser*, post p. 372 [Reporter.

JONES *et al.* vs. NEWSOM *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—DECEMBER, 1876.

IN EQUITY.

1. PARTNERSHIP ASSETS.—The assets of a firm in the possession of one of the partners are held in trust for the creditors of such firm, and if the partner in possession of them is afterwards adjudged bankrupt they are not assets in the hands of his assignee, and if he obtain possession of them he must account to the creditors of the firm for the proceeds.

Jones and William McEwen were partners in a banking business at Columbus, from January, 1865, to March 1, 1870. On the latter day Jones withdrew, leaving McEwen in possession, but without any formal dissolution. Shortly afterwards McEwen joined with him his sons, Gideon and Archibald, in the same business and continued it, using the same books that had been used by McEwen & Jones, until September, 1871, when the three McEwens were adjudged bankrupts.

The assignees in taking possession of the property and effects of the McEwens found among them certain choses in action and other personal property known to have been the property of McEwen & Jones at the time Jones withdrew. The firm of McEwen & Jones was insolvent. Jones demanded of the assignees that they should apply this property to the payment of the debts of McEwen & Jones,

which they declined to do, but agreed with him to keep a separate account of all the effects of McEwen & Jones and hold them subject to the order of this court. This they have done, and in this cause they appear merely as stakeholders.

The bill is filed by Jones and the creditors of McEwen & Jones, to compel the application of the funds of McEwen & Jones, in the hands of McEwen & Sons, to the payment of the debts of McEwen & Jones. Certain individual creditors of William McEwen, who were permitted to intervene, answer, and deny the title of McEwen & Jones and of their creditors, and insist that the title, after the dissolution of that firm and the bankruptcy of William McEwen, and the possession of the assignees under their deed of assigment, was in the assignees, as their trustees, and that no distribution of the fund can be made to the creditors of McEwen & Jones; or, if any, that it can at most only be rateably with them as creditors of William McEwen.

Upon this state of facts the master reported a finding for the complainants. The individual creditors of William McEwen file exceptions to the report.

Baker, Hord & Hendricks and *Herod & Winter*, for complainants.

H. W. Harrington, and *McDonald & Butler*, for intervening creditors.

GRESHAM, J.—William McEwen took the assets in question, clothed with a trust. In equity they belonged to the creditors of McEwen & Jones. William McEwen was the trustee of these creditors, and upon a proper application a court of equity would have compelled him to account to them for the trust property. The individual creditors of a surviving partner who has possession of the firm assets have no claim on those assets as against the firm creditors.

The fact that the creditors of McEwen & Jones failed to assert their right to these assets from the time of the virtual

dissolution of that firm in March, 1870, until the bankruptcy of McEwen & Sons in September, 1871, cannot be said to amount to laches on their part. There is nothing in the evidence showing that McEwen & Sons ever paid a cent for these assets or claimed any title to them.

The adjudication of bankruptcy against William McEwen & Sons operated upon the firm and the individual members of it, and transferred into the hands of the law their individual and partnership assets to be distributed to their individual and partnership creditors. Jones was not a party to that adjudication. As already stated, the assets of McEwen & Jones passed into the hands of McEwen, charged with the payment of the debts of that firm. A portion of those assets reached the hands of McEwen's assignees in bankruptcy. That portion is perfectly identified, and the assignees have kept a distinct account of it.

The assignees of William McEwen or of McEwen & Sons acquired no title under the deed of assignment to the assets which thus found their way into their possession. [1]

Part of the debts of McEwen & Jones are still unpaid, and those unpaid creditors, or Jones as surviving partner, in their behalf, have a right to the assets in controversy.

Exceptions overruled.

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1. *Amsinck vs. Bean, Assignee*, 22 Wallace, 395; *Holland vs. Fuller*, 13 Indiana, 195.

JAMES H. EASTON *et al.* vs. L. F. HODGES *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JANUARY, 1877.

1. EVIDENCE—EFFECT OF STATE STATUTES.—A party to an action at law cannot be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized, and the production of books and writings must be enforced according to modes of procedure not deriving their origin from state statutes or practice.

2. CONFLICT OF LAWS.—In cases where Congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued, such legislation should be followed, although opposed to the forms and mode of proceeding prevailing in the state courts and established by state statutes.

This was an action to recover damages for the alleged conversion by the defendants, of a certain quantity of wheat claimed to have been the property of the plaintiffs. After issue was joined in the cause, the plaintiffs gave the defendants written notice that they desired the examination before trial of the defendants, and the production on such examination of certain letters and writings, and a subpœna was issued and served, requiring the defendants to appear before a United States Circuit Court Commissioner and testify in the cause, and also commanding them to produce on their examination, certain letters and documents.

This proceeding conformed to the practice in such cases authorized by the state statutes, and a motion was made on the part of the defendants, to vacate and set it aside as unauthorized by the statutes of the United States, and the practice in the federal courts.

Finches, Lynde & Miller, for plaintiffs.

De Witt Davis and *D. G. Hooker*, for defendants.

DYER, J.—The statutes of this state relating to evidence provide that no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, but that a party to an action may be compelled, at the instance of the adverse party, to give testimony in the same manner as other witnesses. These statutes also provide that an examination of such party may be had before trial, at the option of the party claiming it, before a judge or court commissioner on notice, and that such examination may be read by either party on the trial.[1]

The proceeding taken by the plaintiffs to secure an examination of the defendants before trial is regular in form under the practice authorized by the statutory provisions referred to. The question is, can such a proceeding be taken in an action at law pending in the Circuit Court of the United States.

By statute of the United States,[2] the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, are made to conform as near as may be to the practice, pleadings and forms and modes of proceeding existing in like causes in the courts of record of the state within which such Circuit or District Courts are held. In applying this provision to the prosecution of causes in the Circuit and District Courts, it has not been construed as requiring those courts to adopt forms and modes of proceeding prevailing in the state courts, in cases where Congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued. Now the sections of the state statute relating to the examination of a party before trial are part of the body of statutory law of the state, relating to evidence. Congress has enacted general statutory provisions on the same subject, which are

1 Revised Statute Wisconsin, Ch. 137, §§ 54-55.
2 § 914, U. S. Revised Statutes.

embodied in Chap. 17, of the Revised Statutes, entitled "Evidence." By these provisions modes of proof and examination are adopted, methods of taking the testimony of witnesses by deposition are established, and the common law disqualification of interest is removed. Under § 858, it is no longer doubted, that a party to an action may be compelled to testify on the trial at the instance of the adverse party, and that the deposition *de bene esse* of such party, may be required and taken in a case where the causes enumerated in the statute exist for taking depositions.[1] Since Congress has thus legislated so generally and fully upon the subject of evidence and modes of proof and examination, it must be held to govern in the federal courts, and to exclude the application in those courts, of the practice in the state courts upon that subject. It is to be observed also, that § 861 declares "that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided." The cases thus excepted are such as are provided for in subsequent sections authorizing the taking of depositions *de bene esse*, and under a *dedimus potestatem*, and, *in perpetuam rei memoriam*. § 861 clearly includes the parties to an action, since under § 858 parties are placed upon the same basis as other witnesses. It is to be borne in mind in this connection, that § 914, which is part of what is known as the practice act of 1872, and § 861, with the entire chapter on evidence were re-enacted in the revised statutes, and must therefore be construed together, and so construed, I am clear that chapter 17 must be held to prescribe the only mode of taking the testimony of witnesses, applicable in the Circuit and District Courts. The principle of construction here applied, has been enforced in this court in other branches of practice, covered by general provisions of the statutes of the United States,

1 *Texas vs. Chiles*, 21 Wallace, 488.

as in cases involving methods of service of process.

Concerning the production of books and papers, Congress has also legislated. § 724 of the Revised Statutes provides that in the trial of actions at law, parties may be required on motion and notice, to produce books or writings in their possession or power, containing evidence pertinent to the issue, "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery"; and certain consequences follow a failure to comply with an order of the court, for the production of such books or writings. Rules of court prescribe the formal methods to be adopted to obtain an inspection of the original books and documents and copies of the same. § 869 of the Revised Statutes also provides for procuring the issuance of a *subpœna duces tecum*, under a *dedimus potestatem*. In view of existing statutes of the United States relating to the entire subject of evidence and the examination of witnesses, and giving to those statutes, as I think we must, exclusive application here, the conclusion is, that a party to an action at law cannot be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized, and that the production of books and writings must be enforced according to modes of procedure not deriving their origin from state statutes or practice.

Motion to vacate proceedings granted.

In re S. A. JEWETT, *et al.*

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—JANUARY, 1877.

IN BANKRUPTCY.

1. PARTNERSHIP—WHAT CONSTITUTES.—Where a person holds himself out as a partner or permits another to hold him out as a partner, and thereby procures credit upon the strength of his supposed relation, he is on principles of natural justice held to be such partner. But knowledge or notice of his being so held out must be brought home to him, or there must be proof of circumstances which will authorize a court to presume notice, before he can be so charged.

2. ESTOPPEL.—A party by neglect of an ordinary duty, as to look after his interest for an unreasonable length of time, is presumed to have approved of the management of the person having it in charge, and by such gross neglect is estopped from denying the existence of the authority exercised by the party claiming to represent him.

3. PRIOR ADJUDICATION.—The adjudication of a firm in one district does not prevent a subsequent adjudication in another district of a firm which is partly composed of the same persons.

A petition was filed in this court against S. A. Jewett, E. D. Jewett and George K. Jewett, charging them with being partners, under the name and style of "S. A. Jewett & Co." located and doing business at Jewett's Mills and Red Cedar Falls, in this state, under which name the debts of the petitioners were contracted. The bankrupts, when the debts were contracted, resided, S. A. Jewett in this state, E. D. Jewett in St. Johns, New Brunswick, and Geo. K. Jewett, in Bangor, Maine. E. D. Jewett and Geo. K. Jewett appeared and filed an answer, denying that they were members of the firm of S. A. Jewett & Co., and setting up that they had been adjudicated bankrupts in the District Court of Massachusetts, before the filing of this petition, as a bar or defense to the adjudication here.

De Witt Davis, *S. U. Pinney* and *I. C. Sloan*, for petitioners.

W. F. Vilas, for E. D. & G. K. Jewett.

HOPKINS, J.—E. D. Jewett & Co. rely upon these points to defeat the adjudication in this case.

1st. That they were not partners of S. A. Jewett; and

2d. If held to be partners, that their adjudication in the District Court of Massachusetts is a bar to their being adjudicated bankrupts in this court.

The counsel on both sides occupied a very wide range in their argument of the case, but I shall notice but few of the points discussed, as, in my opinion, many of them are unnecessary in the determination of the question now involved.

There is no direct testimony to establish the existence of the partnership of the bankrupts: that is, there is no partnership agreement between them proved. If one can be made out, it must be from inference or implication. Taking the testimony of Samuel A. Jewett as true, there would be but little difficulty in solving that question, but as that is contradicted in some of its material parts by the other bankrupts, it becomes necessary to consider and carefully weigh it in connection with such contradictions. And in the first place I may say that the claim that he was to cut the lumber and pay three dollars stumpage, is not, I think, sustained by the evidence. The conduct of parties negatives any such agreement and confirms S. A. Jewett's denial. It is incredible that his brothers would have allowed him to work under such an agreement for over four years without ever calling upon him for any account, or ever investigating to see to what extent he was cutting their timber. The testimony shows also that three dollars is a much larger price than was being paid for stumpage in that region during that time. Again, if Samuel was doing business for them only under that stumpage agreement, they fail to show any excuse for not

looking after their taxes during that period. For if Samuel did not represent them or their interest either as agent or partner, they would, it seems to me, have looked after their own interest and have seen that their taxes were paid. And as Samuel's conduct during that time accords with his testimony on that point, I think his evidence should prevail.

That pretense being disposed of, and that was the only ground upon which they relied to explain the manner in which the business was done and their indifference in relation to it, it becomes necessary to see whether a partnership can be established from the conduct of the parties, and the evidence of S. A. Jewett, and it must be said that S. A. Jewett's theory of the case is coroborated by all his acts and doings in the premises, and unless he was a partner, as he says, it is difficult to see in what character he acted, unless we hold that he was their agent, and to so hold, we should have to conclude he was clothed with the most general authority to manage their interest, that is, to charge them with such liabilities as might be necessary, proper and customary in carrying on that kind of business, which would be as extensive as the authority conferred upon one partner by another. That they had great confidence in S. A. Jewett is not denied. And unless he had understood in some way that they were partners with him, he was guilty of gross fraud and dishonesty in representing them to be such, and getting credit upon their joint names in the manner he did, and I do not believe, from his evidence and the conduct of the parties, that he did so, without their consent and authority. The manner in which they kept their accounts confirms this conclusion. If they had charged the money advanced directly to the firm of S. A. Jewett & Co., that would have been an acknowledgment of the existence of such a firm. In legal effect, however, the charging one-third to S. A. Jewett and two-thirds to Wisconsin land was the same thing. That recognized their liability to contribute two-thirds and S. A. Jewett one-third, which was according to their respective interests in the real estate, and the

timber converted and sold by S. A. Jewett. If S. A. Jewett had been carrying on that business for himself alone, or as their agent, they would have charged the whole to him and made him pay it all to them. They were not liable for the expenses of the business simply because they owned a portion of the land, nor were they liable for any expenses if he was their tenant, agreeing to keep the mill in repair and pay stumpage as they claim. The way they kept their accounts is entirely inconsistent with any theory save that of partners. They were jointly interested in the land, in the growing timber; they were jointly interested in the mills, buildings and improvements for carrying on that kind of business; they made no agreement as to terms upon which anybody else was to use their property and cut their timber. So in view of the manner of keeping their accounts in reference to this property, in connection with the conduct and testimony of S. A. Jewett, I can see no other solution of the matter than to hold that they were partners.

There is another remarkable circumstance that requires notice. They must have known that their brother was carrying on this large business of over $100,000 a year, and to suppose that they allowed him to carry on a business of that magnitude for over four years with property of which they were the owners of two-thirds, without knowing the manner he was doing it, is too unnatural to be credited. Such indifference in regard to one's interest cannot be accepted by courts without the most satisfactory proof. The law presumes that every man will look after his own interest, at least, must hold him to ordinary care and attention to it, and to believe that they totally neglected, for such a period, such an amount of property as they had in this case, being a two-thirds interest in over 23,000 acres of pine lands valued at from one hundred thousand to two hundred thousand dollars, requires an unreasonable amount of credulity on the part of the court. And as they fail to furnish any reasonable excuse for such neglect, I think a court may accept the testi-

mony of S. A. Jewett as showing the true relation between them. In this case there is a community of interest, one of the essential elements of a partnership, and the other one, a sharing in the profits, may be inferred from the acts of the parties and the circumstances of the case where there is no express agreement to that effect. But in this case we are not left to inference on that subject, if the testimony of S. A. Jewett is true, for he says he used the profits for the joint benefit of the parties in making improvements and paying taxes; if his testimony is true in that respect, it is as binding upon them as if their share had been paid them in money, for as to the improvements, they enhanced the value of their interest, and as to the taxes, it was the discharge of a liability which they would have had to meet with their own money if he had not paid them out of such proceeds.

This seems to be the only reasonable conclusion to be drawn from the testimony. It was claimed that if they were not partners as between themselves, they were as to third persons who had given them credit on the strength of their being partners. This might be so, although to charge a person as partner in such cases, it is necessary to show that he was cognizant of the conduct of the party who represented him to be such partner. This is not shown here, but I think, as claimed by the petitioners, that a party by his neglect of an ordinary duty, as to look after his interest for an unreasonable length of time when he knows his property is in the hands of and being managed by a third person, may be presumed to have approved of the management of the person having it in charge, and, by such gross neglect, be estopped from denying the existence of the authority that the party claiming to represent him exercised.

In such cases neither community of interest nor participation in the profits is absolutely necessary. When a party holds himself out as a partner or permits another to hold him out as a partner and thereby procures credit upon the strength of his supposed relation, he is, on principles of natural justice,

held to be such partner. But knowledge or notice of his being so held out must be brought home to him, or there must be proof of circumstances which will authorize a court to presume notice before he can be so charged.

The respondents' counsel claimed that the parties were only tenants in common. They were tenants in common of the real estate it is true, but S. A. Jewett must have been clothed with more power than a tenant in common possession over the common property to have transacted the business he did.

One tenant in common cannot sell the entire property; he can only sell his share, while a partner has authority to sell the whole. S. A. Jewett, the evidence shows, cut timber from the land, manufactured it into lumber, and disposed of it and the whole of it for a series of years, and that, too, with the knowledge of the other owners, and they must, in the absence of evidence to the contrary, be presumed to have acquiesced in and ratified his acts, which would be equivalent to an original authority, so that the claim of tenancy in common as to the business transacted by S. A. Jewett must fail.

He had more authority than is possessed by one tenant in common. He was clothed with an apparent right to manage and carry on the manufacture of lumber and buy and sell it, and such other things as are usually bought and sold in the conduct of that class of business, and by reason of such authority could bind his co-tenants by his acts and contracts in reference thereto, and having adopted the form and name of a partnership, I think, as to parties giving him credit under that name, he bound his co-tenants, and that their long silence may be construed into an acquiescence which would clearly as to third persons if not *inter se* create the relation of partners.

Both E. D. and G. K. Jewett professed too much ignorance in regard to the manner the business was transacted by their brother, more than seemed reasonable, and gave an air of improbability to their testimony, so that I must find that the

defendants are, at least so far as third persons who have given credit, believing and relying upon their being members of that firm are concerned, partners, and liable to be proceeded against in bankruptcy, unless the second ground of defense relied upon is well taken.

This is a question of law, there being no dispute about the facts. E. D. Jewett, when the petition was filed in Massachusetts against the firm of Jewett & Pitcher, was a resident of St. Johns, New Brunswick, and George K. was a resident of Bangor, Maine, so that the District Court of Massachusetts, had no jurisdiction over them individually, nor over them as members of the firm of E. D. Jewett & Co., nor of the firm of S. A. Jewett & Co.[1] The court had jurisdiction of the firm of Jewett & Pitcher, a firm doing business in Boston, of which E. D. and G. K. Jewett were members, because that firm did business in Boston, and the proceedings were against it.

Now the question presented here is, does their adjudication as members of that firm prevent their being adjudicated here as members of the firm of S. A. Jewett & Co., a firm doing business in this state and including another party?

The discussion on this question took a very wide range, but it seems to me it is practically settled by the case of *Amsinck vs. Bean*, 22 Wallace, 395.

In that case one partner had gone into bankruptcy, and his assignee brought an action to recover back money previously paid to a creditor of the co-partnership, on the ground that it was paid in fraud of the provisions of the bankrupt act against preferences.

The court say that in such a case the bankruptcy of one of the parties dissolves the partnership, but that "the solvent partners retain their full right, power and authority over the partnership property in the same manner and to the same extent as if no bankruptcy of a particular partner had

1 *Cameron vs. Canleo et al.*, 9 Bankruptcy Register, 527.

occurred." Again, that although the decree in bankruptcy dissolved the co-partnership, "the joint property remains in the hands of the solvent partner or partners, clothed with a trust to be applied by him or them to the discharge of the partnership obligations, and to account to the bankrupt partner or his assignee for his share of the surplus."

This settles the status of the firm property of S. A. Jewett & Co., and shows that it could and should be retained by S. A. Jewett, after the decree of bankruptcy against his co-partners, with the same power over it as he had before, and the right to use it in the same manner, and that the assignee of Jewett & Pitcher had no right to interfere with it; that his interest was only in the residue, after the payment of the partnership debts of the firm of S. A. Jewett & Co., which overthrows the position of the respondents' counsel, that the assignee of Jewett & Pitcher took as tenant in common with S. A. Jewett, and it is therefore unnecessary to notice the list of authorities that were relied upon as establishing a different doctrine from that laid down in the above case, as that is binding upon this court.

The court in that case further say that "repeated decisions have settled the rule that an assignee of an estate of an individual partner has no such title as will enable him to call third parties to an account for partnership property. * * * That if money paid under such circumstances as a preference can be recovered back at all, it must be claimed by the partnership, in whose behalf it was paid, or by an assignee duly appointed to administer the joint estate as it is quite clear that neither an individual partner nor his assignee can call the party to whom such a payment has been made to account for such a payment any more than he could for any other debt due to the partnership."

This is a complete answer, it seems to me, to the objection of the respondents' counsel that a second adjudication could not be made. Unless such an adjudication can be had the firm of S. A. Jewett & Co. cannot be proceeded

against in bankruptcy at all, and their assets cannot be administered by the bankrupt court, which would exempt a certain class of debtors from the operation of the bankrupt law. E. D. and G. K. Jewett were adjudicated in another interest and for the benefit of another class of creditors who have no standing in this case, neither had the creditors of S. A. Jewett & Co. any standing in the case where the first adjudication was made. The principle laid down by the Supreme Court in that case, carried to its logical results, authorizes an adjudication against all the parties here, for the reason that this is a different firm, composed of different parties whose creditors have wholly distinct rights which can only be protected and enforced by a separate proceeding.

The learned counsel for the respondents felt the force of these principles laid down in that case, and sought to avoid them by claiming that an adjudication of the other member of the firm would bring the case into this court, and that the assignees appointed in the separate cases could unite and recover all claims due this firm. I do not agree with him. Such assignees would not represent the firm. They could not marshal the assets under Section 5121 United States Revised Statutes, that can only be done by the assignee in proceedings by or against the partners as such.

In cases against a firm, the firm creditors have the control of the proceedings, elect the assignee who primarily represents their interests, and where a party is a member of two firms, as in this case, I think he may be proceeded against and be adjudicated in both where both are insolvent and have estates to distribute.

In no other way can the provisions of the law be applied in both firms. The case of *Hunt et al. vs. Pooke et al.*, 5 Bankruptcy Register, 161, holds that a party who has been adjudged a bankrupt individually, may subsequently be adjudicated as a member of a firm, which is a direct authority on the question. It is true it is but an *ipse dixit* of the

Judge, his reasons not being given, but such is nevertheless his opinion.

In re Wallace & Newton, 12 Bankruptcy Register, 191, Judge LOWELL says he knows of no rule that authorizes proceedings in bankruptcy against parties who cannot be joined in a suit at law or in equity; that such proceedings are equitable, and the rule in relation to parties in that court should be consulted in bankruptcy cases.

According to which decision the firm of S. A. Jewett & Co. could not have been joined in the proceedings against Jewett & Pitcher, nor could their estate have been administered there.

I am satisfied that, under the authorities, as well as upon principle, the respondents, E. D. and G. K. Jewett, may be adjudicated as members of the firm of S. A. Jewett & Co., notwithstanding their previous adjudications in Massachusetts as members of the firm of Jewett & Pitcher, and order a judgment of adjudication accordingly.

A good deal of discussion was had on the argument as to whether a partnership creditor could prove his debt against the estate of an individual partner, and if so, whether his discharge would relieve him from such debts. The authorities on that point seem to be somewhat in conflict. But I think the weight of authority is in favor of the view that such debts can be proven, and that being provable, they are necessarily released by the discharge.[1]

A good deal of discussion was had also upon the question as to what property would pass to the assignee in this case if one was appointed. It is not necessary to consider that

1. *Ex parte Crisp*, 1 Atkyns, 134; *Ex parte Elton*, 3 Vesey, 238; *Ex parte Clay*, 6 Vesey, 81; *Ex parte Chandler*, 9 Vesey, 35; *Ex parte Bolton*, 3 Rose, 389; *Tucker vs. Oxley*, 5 Cranch, 34. Opinion by Chief Justice MARSHALL under act of 1800, which was substantially like the present law.

In re Frear, 1 Bankruptcy Register, 660; *Hudgins vs. Lane*, 11 Bankruptcy Register, 462; *In re Millick*, 4 Bankruptcy Register, 26; U. S. Revised Statutes, Sections 5069, 5115 and 5118.

question at this time. That question will arise when an assignee is appointed and proceeds to take possession of property.

The question as to whether the assignee appointed in the proceedings against the firm of Jewett & Pitcher, took the interest of the firm of E. D. Jewett & Co. in this firm, is not now properly before the court, and is not considered on this hearing, but is left to be brought up and disposed of at the appropriate time.

See opinion of Judge DRUMMOND in this case. *In re Jewett*, post p. 473. [REPORTER.

In re JOHN GREEN.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—JANUARY, 1877.

IN BANKRUPTCY.

1. GAMING CONTRACTS.—Contracts of sale that do not contemplate the actual *bona fide* delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time are gambling contracts, and the broker stands in no better position than the seller to recover differences.

2. NOTES VOID FOR WANT OF CONSIDERATION.—If there is no legal liability to pay a claim, notes given therefor are void for want of consideration.

3. Various cases cited and commented upon.

H. M. Lewis, for assignee.

Gregory & Pinney, for creditors.

HOPKINS, J.—Richard Green proved a claim of $7,715.16

against the bankrupt's estate, and James Norris of $1,877.23. The assignee moves to expunge Norris' claim and to reduce Green's. The grounds upon which the motion is made are, that the contracts upon which the claims are based were void, first, by the statute of frauds, and second, that they were gaming contracts. In the view I have taken of the case, it is only necessary to consider the latter.

There has been considerable testimony taken, and it is in some respects quite contradictory, but I think the conflict is more apparent than real. The proof shows that the part of the claim of Richard Green which is objected to, and all of Norris' claim, arose out of losses on wheat contracts, and it is claimed that no wheat was in fact bought or intended to be bought, but the transactions were only purchases of options—wagers on the price of wheat at a future day, and void under the statute of this state on the subject of betting and gaming.[1] If the contract for the purchase and sale of wheat was only colorable and neither party intended to deliver or accept the wheat, but only to pay differences according to the rise and fall of the market price, it would be a gaming contract and void. The form of the contract would not be conclusive. Courts would look into the matter and determine whether the parties really meant to purchase and sell, or whether the transaction was but a mere bet upon the future price of the article. This must be determined by the evidence and circumstances attending the making of the contract and the conduct of the parties in reference to it. The form of the contract would not control or be very material if the transaction itself was illegal.[2]

The court in 72 Pennsylvania, State., 155 after stating that

1. 2 Vol. Taylor's Statutes, page 188, section 16.

2. Cave's 7 Ed. Addison on Contracts, page 209; *Pickering vs. Cease*, 8 Chicago Legal News, 340; *Kirkpatrick vs. Bonsall*, 72 Pennsylvania State, 155; *Cassan vs. Hinman*, 1 Bosworth, New York. 107; *Grizewood vs. Blane*, 73 English Common Law Reports, 526; *Sane Case*, 20 English Law and Equity, 290: *Bourke vs. Short*, 25 Law Journal, Q. B., 196; *Enderby vs. Gilpin*, 5 Moore, 571.

gambling must not be confounded with mercantile speculation, for that is proper, says, "merchants speculate upon the future price of articles in which they deal, and buy and sell accordingly. They forecast the future and buy and sell in a *bona fide* way, which is unobjectionable. But," (the court says) "when ventures are made upon the turn of price only, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall at a future time, the case is changed. No money or capital is invested in the purchase, but so much only is required as will cover the difference or margin as it is figuratively termed. The bargain represents not a transfer of property but a mere stake or wager upon its future price. * * * Such transactions are destructive of good morals and fair dealings, and of the best interests of the community."

Against such transactions the statute is aimed, and when they are proven, the parties must in this state be left without remedy. They are unlawful and void as contravening a sound public policy as well as the statute of the state.

Our statute has gone further than the English statutes on this question; ours makes void all agreements and contracts to pay money lost on a wager either to the party winning or to a party who advances it to aid in the enterprise. It is unlawful to bet and equally so to lend money for that purpose. No cause of action arises in favor of a party to an illegal transaction nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute or a sound public policy or good morals.[1]

It has also been held that where a stake-holder pays over the money to a winner by the direction of the loser after the bet is decided that it will not prevent a recovery back of him by the loser.[2]

Having ascertained the law applicable to such transactions,

1. *Buckman vs. Bryan*, 3 Denio, 340; *Armstrong vs. Toler*, 11 Wheaton, 258; *Hooker vs. Knab*, 26 Wisconsin, 511.

2. *Buckman vs. Pitcher*, 1 New York, 392.

the question recurs upon the evidence: Did the bankrupt intend or mean to deal in the property, or only pay the difference in price at a future day? If the latter, the contract within the decisions above referred to is void.

It is insisted that both the claimants acted as agents only for the bankrupt in buying, and were not the parties selling, so that, conceding the rule of law to be as above stated, they do not fall within it; that they paid the money to the parties selling to the bankrupt, and although the purchase was made through them as agents of the bankrupt in the usual way of trade, and with knowledge of the illegal nature of the contract, still the bankrupt is liable to them for money paid to third parties for the differences, and that it is in the nature of a claim for money paid at his request, and is not within the prohibition of the act. Reliance was placed upon the case of *Rosewarne vs. Billing*, 109 English Common Law Reports, 316, to sustain this claim. That was an action by a broker to recover of his principal money paid by him for differences on illegal contracts for the purchase of shares of railroad stock made by the broker for the principal. The court say that no action could be maintained to recover the differences on such time contracts, but that when such losses were paid by a party at the request of the defendant, such party could recover. The court hold that such contracts are void, but not illegal, and not being illegal, a party paying at the request of the defendant could recover. But this is not the doctrine of the courts of this country. They hold them to be illegal; they say they are unlawful as in conflict with sound morals and public policy as well as inhibited by the statute. But this is not all. Our statute is broader than the English statute. The statute of this state declares all contracts, notes or agreements for reimbursing or repaying any money knowingly advanced for any betting or gaming at the time or place of the gaming or betting to be void. These parties, it seems to me, fall within that statute. They advanced the margins at the time to make the gaming contract, and without their aid in that respect

the contracts would not have been made. So if these contracts are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money required to give them colorable validity. To take their case out of the statute would be establishing a most flagrant evasion of its provisions.

If the bankrupt had requested a party to pay the difference for him after the loss, and such party had not been an actor, nor aided or assisted in the unlawful dealings out of which the loss grew, there would be some reason in allowing him to recover. He would be an innocent party.[1] In such a case the consideration would not, as to him, be illegal; he would not be chargeable with the act declared to be illegal. But here the statute, as before stated, declares all promises or notes to repay money advanced at the time and place, void. The money here was advanced at the time and place. The contracts of purchase were in the names of these claimants. Their claims are not for money loaned to bankrupt to pay differences, but for money paid by them for differences and for which the bankrupt was not liable.

The case of *Steers vs. Lashley*, 6 Term Reports, 61, very closely resembles this. That was an action on a bill of exchange by an indorsee with knowledge of the consideration. In that case the defendant had engaged in several stock jobbing transactions in which Wilson was employed as his broker and had paid the differences. Wilson drew the bill for a part of those differences, which defendant accepted; it was then indorsed to the plaintiff but with knowledge of the facts. Lord Kenyon before whom the case was tried ordered nonsuit. A motion to set it aside was made on the ground that as the broker had paid the difference for his employer, which was the consideration, the bill was not vitiated by the

1. *Jessop vs. Lutwyche*, 10 Exchequer, 614.

original transaction, citing *Faikney vs. Renous*, 3 Term Reports, 418, and *Petrie vs. Hanney*, 4 Burrows, 2609. Lord Kenyon denied the motion, and said that in the cases referred to, the money had been loaned to pay the difference, and afterwards the securities were given for the money so loaned. "But here (he said) the bill on which the action is brought, was given for the very differences which Wilson could not enforce payment of himself," and as the plaintiff took the bill with knowledge he occupies no better position.

If the law was correctly stated in that case, it settles the question that a broker who transacts the illegal business, and pays the differences, cannot recover of the principal the money thus paid; a proposition so clear to my mind that it would hardly seem necessary to quote authority to sustain it. But, plain as it appears, the case of *Rosewarne vs. Billing*, *supra*, cited by the claimant's counsel, seems to sanction a different doctrine. But I do not think that case can be regarded as the law upon this point in England. There are cases in conflict with it, so I think it may be safely asserted that the weight of English authorities is with *Steers vs. Lashley*, *supra*.

If transactions like these are illegal I know of no reason why the broker should be favored, or exempted from the usual consequences that attach to other parties aiding or assisting in the commission of unlawful acts. It makes their business quite hazardous, but that grows out of its illegal character. They can refuse to aid in transactions of such a character, and if they would do so, a great deal of that kind of gambling would stop. Parties like this bankrupt living in the country without means or privileges upon the exchange boards could not embark in such gambling business without their aid. Through brokers and commission men they get access to the exchange boards, and by reason of such facilities are enabled to engage in these gaming contracts which generally end like this, in ruin and bankruptcy.

To their complaint of hardship it is a sufficient answer

that they should not aid and assist parties in transactions condemned both by the law and the principles of sound morality. If they do, they must take the consequences like other transgressors.

Having ascertained that contracts of sale that do not contemplate the actual *bona fide* delivery of the property by the seller nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are held to be gambling contracts and that the broker stands in no better position than the seller to recover differences, it only remains to examine the testimony and see whether the contracts in this case were such. And upon this point I do not intend to go over the testimony in detail. It is self evident from the testimony and the condition of the parties that these sales were not *bona fide*. The bankrupt was not a dealer in grain. He was a country merchant of little or no means; had no money to invest in wheat, that is to pay for wheat, which fact both Richard Green, his brother, and Norris knew. The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it is preposterous. He swears they did not and it is apparent that he could not, and they knew it.

He did not put up any money even for margins, or but a small amount, if any, and made no arrangements with them to do so. Norris says the wheat was bought for him in their firm name. That probably may have been so in the sense that term is used "on change," but that there was a *bona fide* purchase, with the intention that he would take and pay for such large quantities of wheat I do not believe. The purchase it is claimed was made in the name of Norris & Spencer, the brokers, not the bankrupt's, and that they had a number of contracts and perhaps some warehouse receipts for grain is quite probable, and that they might have considered such contracts as the property of the bankrupt, and charged the wheat to him on their books on receiving his order to buy,

so as to make a colorable sale, is not improbable, but that they expected payment for the whole, the testimony completely negatives. The fact that the parties charged the bankrupt with the price of the grain when he ordered it purchased and credited him with the price sold for, when sold, does not prove what the real transaction was. That only represents the form, not the nature of the transaction. It was as well to keep the account in that way when the real intention was to speculate in and pay only the differences as when the sale was of the article itself. The books would show the differences if it was to pay them, and the profit or loss if it was a genuine sale. The books were properly kept in either case, and do not therefore furnish any evidence as to what the contract was.

But it is said that the bankrupt settled with Norris, and gave him notes, and that these notes are good, if the account was not.

That is not so. If there was no legal liability on the part of the bankrupt to pay the claim, the notes given therefor are void for want of consideration. This point is expressly ruled by the Supreme Court in *Hooker vs. Knab*, 26 Wisconsin, 511. See also *Steers vs. Lashley*, 6 Term Reports, 61, *supra*. The question whether the bankrupt could have defended on this ground as against a *bona fide* holder of the notes, does not arise here, as the original parties are alone before the court. The claim of Norris is therefore invalid, and his proof is rejected.

As to Richard Green's claim, the pretended contracts of purchase were made in his name, and not in the name of the bankrupt, and the testimony shows that as between them, all that either ever contemplated was the payment of differences. Under the evidence this is too plain to admit of question or discussion. His claim so far as such differences on grain contracts, are included, is disallowed and the proof is rejected. But as there are some other items of account

that are proper and should be allowed, it will be referred to the Register to take and admit proof of such other items.

The motion of the assignee to expunge the proof of such parties is therefore granted.

Consult *Ex parte Young*, Vol. 6 of this Series, p. 53, also *Clark, Assignee, Etc. vs. Foss et al.*, post p. 540. [REPORTER.

GEORGE B. CORNELL vs. THE DOWNER & BEMIS BREWING COMPANY *et al.* SAME vs. AMERICAN BUSH CO. *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1877.

IN EQUITY.

1. PATENT.—WHAT WILL BE CONSIDERED AN INFRINGEMENT.—Where it is stated in a patent, "We do not wish to confine ourselves exclusively to the V shaped projection, as any form that will prevent the core from turning, independent of the bush, will produce the same result," the patentees are not to be confined to the mere form, but any other form substantially like that, although there may be a change, would be within the terms of the patent.

2. EXTENT OF PATENTS.—Where there is a slight change in a machine, by which a new result is brought about, and which might be the subject of a patent, the invention should not be extended beyond the mere change, although the patent may be sustained, but where something elementary is discovered, and constitutes fairly a part of the invention of the patentee, no other inventor or manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator.

The bill in these cases was filed upon the re-issues A and B, dated August 6th, 1872, of the original patent of Lacy & Cornell, of August 29th, 1871, for an improvement in bushes, and wrenches for their insertion in beer barrels.

The claim of Division A, No. 5,026, is, "The wrench herein described, consisting of a shank A, plate B, projection D, and core E, the said core adapted to fit the opening through the bushing whereby the same is prevented from assuming an oblique position when being turned into place, substantially as described."

The claim of Division B, No. 5,027, is, "The screw-threaded metallic bung-bushing, made tapering upon both its outer and inner sides, and protected with the flange B, having the V shaped notch *d*, by and for the purpose described."

A motion for a preliminary injunction was made on the first bill and affidavits in support, and opposed, and after full argument an order was entered February 4th, 1875, granting such injunction, *nisi*, etc., and the causes were brought to argument on pleadings and proofs in May, 1876.

Goodwin, Offield & Towle, and *J. W. Merriam*, for complainant.

L. L. Coburn, for defendants.

DRUMMOND, J.—In this case, everything must depend on the construction which shall be given to the patents which have been re-issued to the plaintiff. If the true construction is that contended for by the defendants, then it can hardly be said that the defendants have infringed. I do not propose to consider these patents separate from each other, but, really, as constituting together substantially one patent, to accomplish a particular purpose. To be sure, there are two patents issued, and two claims made by Lacy and Cornell, but they were issued at the same time (the re-issues), and they refer to the same common object. If this were a suit upon the bung bush alone, without reference to the wrench, the court might possibly be disposed to take a different view of the matter; but looking at both together as in a certain sense one conjoint patent consisting of several parts, the question is, What is the true construction of the re-issued

patents? Is it so narrow as that contended for by the defendants? I hardly think that it is. It seems to me that the object was to make a bush of a particular kind, possessing certain attributes; and secondly, at the same time, to make a wrench which could be applied to the bush in a particular way, so as to insert it in the cask or barrel. The qualities of the bush were, that it was to be metallic, with a screw on the outside, smooth on the inside, tapering both outside and in, and with a flange to press on the stave of the cask, and a device for the "engagement" of the wrench with it, by means of which it was to be inserted in the barrel. The wrench had a handle, its other end being expanded or flattened out, and a device was attached to it by which it could be engaged in the bush, and it was to possess a core which was to be inserted in the hole of the bush, and into which, when the bush was screwed in the barrel or cask, a wooden plug or bung could be driven. Now, the question is, whether or not this was a patentable invention, and how far the invention extends. There can be no doubt, I think, that it was a patentable invention. If it be true that there were bung bushes manufactured of metal and with a screw outside, and a flange, which was to rest upon the stave of the barrel, there does not seem to have been a bush constructed like that of the plaintiff's, and which was to be inserted into the barrel by the same device or apparatus as his, viz: by a wrench with a shank, and a device to engage with the bush, and with a core constituting a part of the wrench which was to fit into the hole of the bush, and so, by the operation of revolving the bush in the barrel, to be inserted firmly, so as to make it tight, and in such a way that the operator could have complete control of the bush by means of the wrench, and pressing equally on all sides of the bush, one of the objects being to remove the core and insert a different sized one, when necessary, corresponding to the size of the bung bush.

I think, therefore, it was a patentable invention. As I understand, there never had been, before it was discovered

by these parties, a bung bush with a wrench, such as are described in these patents. The core, taking it altogether, seems to be an essential element of the device, and is one of the principal objects, and I should think, also, one of the principal excellencies of the whole device, because it enables the operator in inserting the bush into the cask, to command completely the act of insertion. I agree with the counsel of the defendant's, that the V shaped device in the bush, and the corresponding device in the wrench, are essential parts of the invention of the plaintiff and Lacy; but while that is so, the question is whether or not the plaintiff is restricted to the precise form in which the patent has set forth the device.

There is a V shaped device in the bush, and there is a corresponding one in the wrench, where the bush is to be inserted —so that they engage together, and in this way the bush is inserted in the cask. While this is an essential part of the device, is the plaintiff limited to that precise form? If he is, then I suppose it may be admitted that the defendants do not in that particular infringe; because that identical form is not used by the defendants. A change is made, but the bush is used substantially, as well as the wrench and the core, and another method is adopted by which the engagement takes place between the wrench and the bush, so as to hold the bush fast while it is being inserted in the barrel. The main difficulty of this part of the case has been in reference to the particular device of the plaintiff. It is said in the patent, "We do not wish to confine ourselves exclusively to the V shaped projection, as any form that will prevent the core from turning, independent of the bush, will produce the same result." They are not to be confined to the mere form, but any other form substantially like that, although there may be a change, would be within the terms of the patent. I have come to the conclusion, after some hesitation, that considering the core was a very essential part of the mode of inserting the bush, and one of the objects which the inventor

had in view was to enable the wrench, and the core, as a part of it, to engage with the bush so as to firmly turn the bush in the act of insertion—that the mere change in this method of engagement, although varied in different ways, does not prevent the infringement of the substantial part of the plaintiff's device. It is often very difficult in patent cases to determine the extent of the invention. Where there is a slight change in a machine, by which a new result is brought about, and which might be the subject of a patent, courts do not feel inclined to extend the invention beyond the mere change, although they may be inclined to sustain the patent; but where something elementary, so to speak, is discovered, and constitutes fairly a part of the invention of the patentee, then I do not think that any other inventor or manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator. Such I regard the core in this case. I think that belongs to the plaintiff, and that it is not right or just for any one to use it without his consent. What I mean is, that the defendants are prevented from using such an arrangement with the core in it, so as to engage it with the bush of the plaintiff, and by which, if done, there is an infringement of the plaintiff's patents.

Decree entered for plaintiff for perpetual injunction, with reference to the Master to assess damages.

JOHN A. THOMSON, Assignee, Etc., vs. CHANDLER BRADFORD *et al.*

District Court.—District of Indiana.—January, 1877.

In Equity.

1. Circuity of Action.—When a court of equity obtains control of a fund and the parties entitled to it, it will at once place the money where it will ultimately go.

2. Priority of Installments of Mortgage Debt—has its foundation in the rule governing the application of payments, and does not apply to mortgage notes gives to secure indorsements.

The petition, which was filed on the 30th day of April, 1874, recites a previous order of court made in *In re Joshua Shipp*, in bankruptcy, for the sale of certain lands of Shipp, freed of a mortgage to Harvey Lewis, and alleges that all the lands had been sold except one parcel, in which Chandler Bradford claimed an interest, which was a cloud on the title. The purpose of the bill is to extinguish Bradford's claim.

Bradford answered May 29, 1875, setting up title by purchase on the—day of———, 1871.

On the 27th of August, 1874, Overstreet and Holmes, assignees of Harvey Lewis in bankruptcy, filed a cross-bill setting up a mortgage by Shipp to Lewis on the lands, executed May 1st, 1875, to secure four notes of that date for $5,000 each, at one, two, three and four years; that the second and third of these notes had been assigned by Lewis to Nathan Powell; that Lewis had become bankrupt, and Overstreet and Holmes were appointed his assignees, and that the first and fourth of these notes, together with the mortgage, had come to them as such assignees as assets of Lewis's estate; prayer for payment out of proceeds of sale.

On the 27th of August, 1875, Nathan Powell, having been

admitted as a party, answered confessing the cross-bill. He also at the same time filed his cross-bill setting up his title to the two notes by *bona fide* purchase before maturity, and praying the same relief as Overstreet and Holmes in their cross-bill, and such additional relief as might be equitable. Issues were joined on the bill and cross-bills.

After the land was sold and certain payments made, a balance of $5,056.71 was left, applicable to the Lewis mortgage.

Byfield & Howe, for assignees of Lewis.

Baker, Hord & Hendricks, for Nathan Powell.

Gresham, J.—The only question now in the case is as to the distribution of this fund. Lewis's assignees in bankruptcy, claim it as being the holders of the first of the four $5,000 notes. Powell claims it by assignment from Lewis of the second and third notes. Copies of these notes are annexed to Powell's cross-bill. The assignment of them is in these words.

"For value received, I assign the within note to N. Powell, and agree to take it up at maturity. H. Lewis."

The testimony taken by the Master shows that the mortgage to Lewis was merely to indemnify him as indorser for Shipp on divers notes and bills, the particulars of which as to dates and times of maturity are not given, and that the four notes described in the mortgage were mere fictions.

Whatever right Powell had as against Lewis he has against his assignees in bankruptcy. Powell's rights were in nowise impaired by the bankruptcy of Lewis. The assignees of Lewis can assert no right, as against Powell, that Lewis himself might not assert, if he were not a bankrupt. The assignees are in strict privity with Lewis, and bound by his contract with Powell. The bankruptcy of Lewis conferred no greater right on his assignees to the fund in court than Lewis himself would have had.

It is insisted by Lewis's assignees, that the priority accorded to successive installments of a mortgage debt entitles them as the holders of the first note to the fund in court as against Powell, who holds the second and third notes. But the mortgage notes do not represent installments of indebtedness—they are mere fictions, and had no other effect than to fix the time for paying the damnified indorser. Lewis could not have foreclosed against Shipp for the amount of the notes. The priority accorded to successive payments of a mortgage debt has its foundation in the rule governing the application of payments.[1] That rule has no application to this case.

When the second and third notes passed into the hands of Powell before maturity without notice of their character, they ceased to be fictions. Shipp then became liable to Powell, whether Lewis was damnified or not, and if Lewis had sued Shipp to recover money paid on indorsements the latter could have pleaded the assignment of the second and third notes to Powell. As between Shipp and Lewis the assignment to Powell was a payment by Shipp to Lewis. That payment would stand against the first sum that Lewis might be obliged to pay as Shipp's indorser. Lewis had no right to sell Shipp's notes, and in doing so he committed a fraud.

The fund and parties are all in court. Courts of equity are not inclined to favor circuity of action, and they never require a vain or foolish thing. It would seem to be trifling with justice to order the money in court to be paid into the hands of Lewis's assignees and then require them to pay it over to Powell, or to remand Powell to an action to recover it.

When a court of equity gets control of a fund and the parties entitled to it, it will at once place the money where it must ultimately go.[2]

An order will be entered directing the money in court to be paid to Powell.

1. *Goodall vs. Mopley*, 45 Indiana, 355.
2. *Dixon vs. Clayville*, 2 Law and Equity Reports, 404.

SECKEL vs. BACKHAUS *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JANUARY 1877.

IN EQUITY.

1. JURISDICTION.—FORECLOSURE BY ASSIGNEE.—Under the act of March 3, 1875, the United States Circuit Courts have jurisdiction of a bill to foreclose a mortgage in behalf of a non-resident assignee of such mortgage, though the assignor could not, by reason of citizenship, have filed such bill.

The complainant filed a bill to foreclose a mortgage of which he was the assignee. The bill alleged that the mortgage was given to secure certain notes executed by the mort gagor, which notes and mortgage were sold and transferred by the payees and mortgagees named therein, and by written assignment and delivery came to the hands of the complainant. Defendant demurred on the ground that the court had not jurisdiction of the subject-matter of the action.

Winfield Smith, for complainant.

E. Mariner, for defendants.

DYER, J.—By the demurrer to the bill the question is presented whether this court has jurisdiction of a suit in equity to foreclose a mortgage, prosecuted by a non-resident assignee, in a case where the assignor is a citizen of the state and district in which the mortgagor resides and the action is brought. This question must be answered as we determine the construction to be given to the first section of the act of Congress of March 3d, 1875, relating to the jurisdiction of circuit

courts of the United States.[1] That act (§ 1), after providing that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * in which there shall be a controversy between citizens of different states," declares that "no circuit or district court shall have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." Prior to the passage of this act no suit at law upon a promissory note could be prosecuted in the Federal Court by the transferee or assignee of the note, in cases where the assignor, by reason of citizenship, could not have prosecuted such suit. By virtue of the enlarged jurisdiction conferred by the act, such an action may now be maintained by an assignee who is a citizen of another state, though it could not have been prosecuted by the assignor. Now, does the act give to the court jurisdiction to entertain a proceeding in equity in behalf of such assignee, to foreclose a mortgage given to secure promissory notes, in a case where the assignor could not, because of citizenship, have prosecuted such a suit?

In *Osgood vs. Chicago, Danville and Vincennes R. R. Co. et al.*, 6 Bissell, 330, the circuit judge of this circuit, in construing the act of March 3d, 1875, regarded it as the intention of Congress, by that act, to consolidate in one act all the previous general acts conferring jurisdiction upon the circuit courts, and at the same time to give the court jurisdiction in some cases where no previous act of Congress had conferred it. By the act, not only is jurisdiction extended, but the right is given to remove causes from state to Federal Courts

1. 18 U. S. Statutes at Large, part 3, p. 470.

in cases where removals were never before authorized. The language of the first section includes suits of a civil nature in equity, as well as at common law; and another section of the act contains new and ample provisions for acquiring jurisdiction of non-resident parties in suits for enforcement of equitable and other liens. Reference is made to these features of the act, as indicative of its spirit and general scope. A mortgage given to secure the payment of a promissory note is a mere incident to the note. It is extinguished by payment of the note. It passes with a transfer of the note. The debt is the principal thing, and the mortgage is collateral. No defense involving the validity of the debt can be set up against a mortgage in the hands of an assignee which cannot be set up against the debt itself. A mortgage is attached to the debt, and follows its destinies and ownership. It is beneficially assigned, transferred , released, surrendered, re-issued and revived with the instrument evidencing the debt, and without any other forms or ceremonies than are requisite in case of the latter.[1]

Although it was formerly held by the Supreme Court of the United States that, in a foreclosure decree, it could not be adjudged that the mortgagor pay a balance that might remain unsatisfied after exhausting the proceeds of the mortgaged premises,[2] it is now provided by rule of that court that, in suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due, over and above the proceeds of sale, and execution may issue for the collection of the same.[3] In view of the relation which the mortgage bears to the debt, it may be accurately said that an action to foreclose the mortgage is founded upon the debt. It rests upon the principal contract, which is the note, and its object is the recovery of the debt by exhausting

1. *Martineau vs. McCollum et al.*, 4 Chandler, 153; *Croft vs. Bunster et al.*, 9 Wisconsin, 503; *Blunt vs. Walker et al.*, 11 Wisconsin, 334.
2. *Noonan vs. Lee*, 2 Black, 500; *Orchard vs. Hughes*, 1 Wallace, 74.
3. 1 Wallace, 3.

the security, which is the incident; and, as we have seen, the security being exhausted, the debtor may be pursued in the same proceeding by execution for any balance against his general property.

In *Sheldon vs. Sill*, 8 Howard, 441, cited in the argument, the court say that a mortgage is but a special security, and that the remedy obtained on it in a court of equity is but the satisfaction of the debt. "It is the pursuit, by action, of one debt on two instruments or securities, the one general, the other special." The jurisdiction invoked by bill to foreclose, is appealed to for recovery of the debt, the evidence of which lies in the principal contract, the note. The mortgage following the debt, the holder of the debt has the equitable right to the security, and can therefore foreclose. As the result of this view of the question, I hold that, under the act of 1875, this court has jurisdiction in a suit in equity to foreclose a mortgage given to secure a promissory note where the assignee and holder is a citizen of another state, and the maker a citizen of this state and an inhabitant of this district, though the assignor could not, by reason of citizenship, have brought the suit.

Demurrer overruled, with leave to answer.

Although the assignment of a note secured by a mortgage carries with it the equitable interest in the mortgage, it carries only an equitable interest. *Edgeton vs. Young*, 43 Ill., 464. The mere assignment of the mortgage by an indorsement thereon, without an assignment of the note, will not operate to pass the power of sale to the assignee, but it will still remain in the mortgagee. *Hamilton vs. Lubukee*, 51 Ill., 415.

Although no defense can be made to a promissory note transferred to an innocent purchaser before maturity, still when the assignee of such a note proceeds to enforce payment in a court of equity by foreclosure of a mortgage or other lien, he will occupy the same position that the payee would, and the maker may interpose any defense that would defeat a recovery in the hands of the payee. *Thompson vs. Shoemaker*, 68 Illinois, 256.—[Reporter.

THE PAWTUCKET INSTITUTION FOR SAVINGS vs. MARY D. BOWEN *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1877.

IN EQUITY.

1. FORECLOSURE AGAINST MARRIED WOMEN.—PERSONAL DECREE.—A personal decree will not be granted against a married woman who joins her husband in a note and gives a mortgage on her real estate to secure its payment, when the mortgage is foreclosed, and on sale the premises fail to bring enough to pay the note.

2. PERSONAL LIABILITY OF MARRIED WOMEN.—A married woman cannot be held liable personally, even under the law as it now stands, unless it is made to appear that the debt contracted was for her personal benefit, and about her personal interests, or for the purpose of protecting her personal estate, or that she became surety for her husband.

This was a bill to foreclose a mortgage. The complainant had obtained a decree against the mortgagors and sold the mortgaged property under its decree. The Master had reported the sale, and reported that there was a balance remaining unpaid; and the complainant then asked a judgment or a decree in the nature of a judgment at law, for the balance unpaid.

Mattocks & Mason, for complainants.

E. A. Otis, for defendant.

BLODGETT, J.—The facts in the case are substantially these; Ira P. Bowen and Mary D. Bowen, his wife, joined in a note to the Pawtucket Savings Bank, and also in a mortgage to secure the payment thereof. The evidence submitted with the Master's report, shows that the real estate

given as security, was Mrs. Bowen's real estate; and that the loan was secured by the pledge of her property. The application now is for a judgment against both Mrs. Bowen and her husband, which is resisted on the part of Mrs. Bowen, she contending that no personal decree can be taken against her for the balance. I think the position that a personal judgment should not be rendered against her is well taken, and for these reasons:

It is in evidence in the case, that Mrs. Bowen was a married women at the time this loan was affected, and this security given. There is no averment in the bill, and there is nothing in the case to show that this debt was contracted about her separate estate; that it was a loan for her special benefit; but all the facts in the case go to show that this loan was really made by Ira P. Bowen for his purposes and his business, and that his wife only signed as security for him, and pledged her own property to secure his debt. I do not think that a married woman can be held liable personally, even under the law as it now stands, unless it is made to appear that the debt contracted was for her personal benefit, and about her personal interests, or for the purpose of protecting her separate estate.

Now, there is no evidence in the case that she became surety for her husband, although it is a joint and several note of Mr. and Mrs. Bowen, and I think all the presumptions are that her signature was attached to the note solely for the purpose of making the loan regular upon its face, in order that the security and the indebtedness might correspond.

I do not think, therefore, that the complainant is entitled, in addition to taking this woman's property, to have a personal decree against her.

NOAH S. GREGG vs. JOHN WESTON AND W. G. SCHULTZ.

CIRCUIT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1877.

PROMISSORY NOTE.—JURISDICTION OF UNITED STATES COURT.—The Statutes of Indiana make all promissory notes negotiable so far as to vest the property in each indorsee successively; but unless a note is made payable to order or bearer at a particular bank, whatever equity the maker was entitled to against the payee he may assert against any indorsee. Under such a statute the United States Courts have no jurisdiction of an action by an assignee of a note not made payable at a bank, as such a note is not a "promissory note negotiable by the law merchant."

2. The statutes of a state enter into and become part of a note made in that state.

Harrison, Hines & Miller, for plaintiff.

Jacobs & Terrell, for defendant.

GRESHAM, J.—Gregg, a citizen of Ohio, sues Weston and Schultz, both citizens of Indiana, on a note executed by Weston to Schultz, and by the latter assigned to the plaintiff.

The note, a copy of which is made part of the complaint, was given at Kendallville, Indiana, August 4th, 1870, payable to the order of M. G. Schultz. The defendants demur to the complaint on the ground that this court has no jurisdiction.

Under the Judiciary Act of 1789 the circuit courts of the United States have no cognizance of any suit on a promissory note in favor of an assignee, unless a suit might have been prosecuted in such court on such note if no assignment had been made. It is admitted that under this statute this action could not have been maintained. But it is urged by the plaintiff that this court has jurisdiction of the action under the first section of the act to determine the jurisdiction of

the circuit and district courts of the United States, approved March 13th, 1875.[1] That part of section 1 which is relied on by the plaintiff as conferring jurisdiction on this court reads as follows, viz:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

In Indiana only notes payable to bearer or order at a bank in this state are negotiable as inland bills of exchange.[2] The question is, what is meant by the words "promissory notes negotiable by the law merchant" in the act of Congress? The plaintiff insists that Congress contemplated all promissory notes negotiable at common law or by the statute of Anne. I think Congress meant by this language, notes having the qualities of promissory notes negotiable by the law merchant, namely, notes which, in the hands of a *bona fide* purchaser for value before maturity, were subject to no equities in favor of the maker. The note sued on was given in Indiana and payable in Indiana, but not at a bank in this state, so that, by the law of Indiana, whatever equities the maker was entitled to as against the payee he may assert against any indorsee. That was the law of the contract. The statute of the state entered into and became a part of the note.[3]

The statute already cited makes all promissory notes negotiable so far as to vest the property in each indorsee successively, but unless a note is made payable to order or bearer at a particular bank in this state, it cannot be said to possess all the privileges or immunities of a note negotiable according

1. 18 U. S. Statutes at Large, 470.

2. 1 Davis' Indiana Statutes, 636, § 6.

3. *Holloway vs. Porter*, 46 Indiana, 62; *Dundas vs. Bowler*, 3 McLean, 397; *Brabston vs. Gibson*, 9 Howard, 263.

to the law merchant. The statute of Anne has generally been adopted in this country, but has never been adopted in this state.

This opinion has been submitted to my brother DRUMMOND, and he concurs therein.

The defendant's demurrer is sustained.

See *Seckel vs. Backhaus, ante*, p. 354.—[REPORTER.

J. SMITH HUNTER vs. SILAS A. HAYS, ASSIGNEE OF GEORGE W. BEAUCHAMP.

CIRCUIT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1877.

IN EQUITY.

1. RENTS OF MORTGAGED PROPERTY.—In Indiana the mortgagor of property, being entitled to possession, is entitled to the rents, and if he become a bankrupt his assignee succeeds to the right for the benefit of his unsecured creditors.

2. When mortgaged premises are insufficient to pay a mortgage debt, the mortgagee would be entitled to an order applying the rents to the payment of his debt, but if he makes no demand for the rents, and takes no steps to have the same applied to his debt, the mortgagor can hold them.

S. Claypool, *Thomas M. Brown*, and *J. W. Gordon*, for plaintiff.

Dye & Harris, and *William A. Brown*, for defendant.

GRESHAM, J.—The plaintiff brought suit in the Putnam Circuit Court against the bankrupt to foreclose a mortgage on a lot in Greencastle and a stock of goods.

Subsequently Hunter and others brought other suits in the

same court, which were consolidated with the suit to foreclose. On the 19th of February, 1873, Samuel Woodruff was appointed receiver in the cause and took possession of the mortgaged property.

Before the commencement of any of the suits in the state court, a petition was filed in this court to force Beauchamp into bankruptcy, and on the 25th of August, 1873, while the case was pending in the state court, an order of adjudication was entered. On the 29th of October, 1873, Silas A. Hays, who had been appointed assignee, was admitted to answer in the state court, and on the same day by agreement of all parties the suit was transferred to this court.

The receivership was not disturbed until the 5th day of January, 1874, when the receiver settled with the assignee and delivered to him all the assets, including the real estate.

Hunter rented the real estate from the receiver shortly after his appointment, and continued in possession, paying rent to both the receiver and the assignee until some time in 1875, when the mortgaged premises were sold.

The Master held the mortgage void so far as it related to the goods; that the mortgage should be foreclosed on the real estate, and that the rents which accrued pending the proceedings to foreclose belonged to the assignee of Beauchamp, the mortgagor, and not to Hunter, the mortgagee. The exceptions to the Master's report giving the assignee the rents, seem to be the only real controversy in the case. It was conceded in argument that the real estate was at all times insufficient to pay Hunter's claims, and that the general assets were small compared with the debts proved.

Section 1 of an act of the Legislature of the state concerning mortgages, approved May 4th, 1852, [1] declares that, "unless a mortgage specially provides that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same."

1 2 Davis' Indiana Statutes, 333.

Under this statute the mortgagee cannot maintain an action against the mortgagor for possession, as he might at common law, nor can he compel the tenants in possession, on notice and demand, to account to him for rents.

Woodruff was appointed receiver by agreement of all the parties for the benefit of whomsoever it might concern. The mortgagee made no demand upon either the receiver or the assignee for the rents, nor did he take any steps to have the rents applied to his debt. The receiver was not appointed at the instance of the mortgagee, and for his individual benefit. I think, on the facts of this case, the mortgagee would have been entitled to an order applying the rents to the payment of his debt. In this state, in the absence of such an order, the mortgagor, being entitled to the possession, is entitled to the rent, and if he becomes a bankrupt his assignee succeeds to this right for the benefit of his unsecured creditors. Until the rents are intercepted and applied to the mortgage debt by an order of court they belong to the mortgagor or his representatives, until then the mortgagee has no right to them.[1]

Exceptions overruled.

1. *Foster vs. Rhodes*, 10 Bankruptcy Register, 523; *In re Bennett*, 12 Bankruptcy Register, 257.

AARON WOLF *et al.* vs. JOHN G. SMYTHE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1877.

1. COMMISSIONS AS AGAINST BONA FIDE HOLDER OF BILL OF LADING.—Although the *bona fide* holder of a bill of lading is entitled to the proceeds, the consignee has the right to deduct his commissions, and also the charges and insurance advanced by him.

H. G. Lunt, for plaintiff.

Leffingwell & Johnson, for defendant.

BLODGETT, J.—This case was tried several weeks since by a jury, and a judgment rendered for $685.88. The suit was brought to recover the proceeds of four car loads of wheat, shipped by a man named Belden, to the defendant, Smythe, which the plaintiffs claim was duly assigned to them by Belden, and that they are entitled to the proceeds. It appears that Belden was a wheat buyer in Iowa, and the plaintiffs are bankers. The plaintiffs, in due course of business, advanced money to Belden with which he bought the wheat and shipped it to the defendant, who is a commission man in this city, for sale. Smythe received the wheat in question and sold it.

The evidence shows that Belden, on the shipment of the wheat, passed the bills of lading over to the plaintiffs, who had advanced him the money, and they made the drafts, and the drafts and the bills of lading came forward together, were duly presented to Smythe for payment, and he instead of paying the money on the drafts, passed it over to Belden's private or general account. This question has been up several times before the court, and the rulings have been uniform, that the party holding the bill of lading on a draft of that

kind is entitled to the proceeds. So there is no necessity of re-discussing the law in that case. The trial, however, was an *ex parte* trial, and the court allowed plaintiffs to recover the full amount of the drafts at the time of the trial. The defendant was not represented. Pleas were in, but the pleas were the general issue.

The defendant shortly afterwards entered a motion for a new trial, and the matter came up on affidavits, and in the course of the discussion and disclosure of facts, it appears that no credit was given to the defendant, Smythe, for the charges which he paid upon this wheat. The wheat was shipped forward to the defendant, in this city, to be sold by him, and he advanced the charges and insurance, and was entitled to his commission. No credit was given him for the charges and commissions, but the plaintiffs took the judgment for the full amount of the drafts with interest to the time of the trial. Smythe now comes in with some affidavits showing that the net proceeds of the wheat were only $578.57 Judgment was rendered for $685.88. I have no doubt that the defendant is entitled to that reduction, and therefore the judgment should be reduced to $578.57 by remitting $107.31.

A *remittitur* of $107.31 will be entered.

THE WESTERN UNION TELEGRAPH COMPANY vs. THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1877.

IN EQUITY.

1. EXCLUSIVE TELEGRAPH LINE—PUBLIC POLICY.—A contract between a railroad company and a telegraph company, that the former will allow no other telegraph company to construct a line along its road, is not inoperative as against public policy.

2. CONDEMNATION.—When a railroad is in the possession of a Receiver of the U. S. Court, a telegraph company can acquire no title to its right of way by condemnation proceedings in a state court.

3. RATIFICATION BY RECEIVER.—If the receiver ratifies a contract previously made with the company, the rights under such contract are not affected by the foreclosure proceedings.

Motion to dissolve injunction.

McDonald & Butler, *Williams & Thompson*, and *Harrison*, *Hines & Miller*, for complainants.

Matthews, *Ramsey & Matthews*, and *Baker*, *Hord & Hendricks*, for defendants.

DRUMMOND, J.—The Ohio & Mississippi Railroad Company executed mortgages upon its line of road in this state, and afterwards a contract was made by the railroad company with the plaintiff, The Western Union Telegraph Company, by which a telegraph line was to be established on the line of railroad, on the terms agreed upon between the parties.

The contract declared that no other telegraph company should establish a telegraph on the line of the railroad. The telegraph line was constructed by the plaintiff under this

contract, and it was used for the benefit of the telegraph company, and also for the railroad company, according to the stipulations agreed on. Proceedings of foreclosure were commenced against the railroad company, on the mortgages already mentioned, and a sale took place, and under the sale there was a re-organization, and the name changed to "The Ohio & Mississippi Railway Company," which executed other mortgages upon the road, and default having been made in the payment of interest on those mortgages, a bill was filed in this court for foreclosure, and for the appointment of a receiver. Receivers were accordingly appointed, who took possession of the railway after the foreclosure of the first mortgages, and before the filing of the bill against The Ohio & Mississippi Railway Company. The Receivers ratified, confirmed and adopted the contract made between The Western Union Telegraph Company and The Ohio & Mississippi Railroad Company, and seem to have acted upon the theory that the contract was still in force as against the railway company. The Western Union Telegraph Company was not a party to the foreclosure suit which resulted in the re-organization of The Ohio & Mississippi Railway Company.

In this condition of affairs, The Atlantic & Pacific Telegraph Company was organized under the general laws of this state, and was proceeding to construct a telegraph line on the railway of the Ohio & Mississippi Company, in direct competition with the telegraph line of the plaintiff. The receivers seem to have acquiesced in this action of The Atlantic & Pacific Telegraph Company which, it is to be observed, was apparently nothing but an agent of the telegraph company of the same name, of New York, and was organized simply for the purpose of extending the line of the New York company to the Mississippi River.

The Atlantic & Pacific Telegraph Company commenced proceedings in the state court, while the railway was in the possession of the receivers of this court, with a view to condemn

the right of way, or any interest which The Western Union Telegraph Company might have had on the line of road of The Ohio & Mississippi Company. This was done without application to or the authority of this court. Thereupon The Western Union Telegraph Company filed a bill in this court on the 28th day of December, 1876, claiming that the defendant company had no right to construct a line of telegraph on the right of way of The Ohio and Mississippi Company, neither had the latter any right to permit such a telegraph line to be constructed, for the reason that it was a violation of the contract which The Ohio & Mississippi Railroad Company had made with the plaintiff.

An injunction was granted by the District Judge, and the motion is now made upon answer and affidavits to dissolve the injunction, and to allow the defendant company to go on with its condemnation proceedings in the state court, with the view of constructing its telegraph line on the roadway of The Ohio & Mississippi Company.

In the argument on the part of the defendants, various objections have been taken to the continuance of the injunction, and to the enforcement of the rights of the plaintiff under the contract made with The Ohio & Mississippi Railroad Company. It is said that such a restriction as was contained in the contract for the construction of the telegraph line of the plaintiff, to prevent other lines from being established on the roadway, was in violation of public policy, and therefore inoperative. If the effect of this clause in the contract was to prevent to any considerable extent the construction of competing lines of telegraph between important points, and thus prevent that kind of communication, there might be something in the objection; but it is to be recollected that there are numerous lines of railway between Cincinnati & St. Louis, which are the two important points of communication, and between which The Ohio & Mississippi Railway offers a very direct line of road.

And then, while it is true that it is more convenient to

construct telegraph lines on railways than on the common highways of the country, or through fields and wood lands, still it is quite possible to construct them otherwise than upon a line of railroad. A telegraph line, for instance, could be constructed immediately and adjoining the roadway of The Ohio & Mississippi Company, but outside its boundaries.

And besides, if it were indispensable that another telegraph line should be constructed upon The Ohio & Mississippi Railway, the right of property which the Railway Company or the Western Union Telegraph Company might have, and with which the other telegraph company would interfere in the construction of its line, might be acquired as stated hereafter by proceedings for condemnation under the laws of the state.

For these reasons, therefore, this restriction in the contract cannot be said to be so contrary to public policy as to render that part of the contract between The Western Union Telegraph Company and The Ohio & Mississippi Railroad Company inoperative.

It was objected also that the sale of the road under the foreclosure proceedings put an end to the contract, but, as has already been stated, the purchaser confirmed, ratified and adopted the contract, and so became a party to it by ratification, and although in one sense it was a different company from that which originally made the contract, still, as it operated the same line of road, the same necessity existed for the use of the telegraph line, and it availed itself of the benefits of that line by ratifying the contract, and it thereby became bound by whatever obligations rested upon its predecessor by that act of ratification and of use.

The proceedings which took place in the state court upon the part of the telegraph company of this state to condemn the right of way, or whatever interest The Western Union Telegraph Company had in the right of way of The Ohio & Mississippi Company were inoperative. The property to be affected by these proceedings was in the possession of this

court through its officers, the receivers, and that being so, no action could take place in the state court affecting it without the consent first obtained of this court. An application should have been made to the receivers, and they should have come to this court, or the application might have been made directly to this court by The Atlantic & Pacific Telegraph Company for leave to proceed in the state court, and it would then have been a question whether it was proper to grant that leave. No rights therefore have been acquired by the institution of these proceedings in the state court. They must be considered as invalid, the rule being well established in the federal courts that when property is in its possession through its receivers, all proceedings in the state court affecting it, without the authority of the Federal Court, are invalid.

It is not necessary to decide whether this fact would alone have authorized the issuing of the injunction, or, whether existing, it alone would warrant its continuance.

It was also objected that The Western Union Telegraph Company had not complied with the law of the state, of June 17th, 1852, as to foreign corporations doing business in this state, though it had its principal place of business, and an office in Indianapolis. It may be important to ascertain with a view to the future consideration of this question, whether this contract was made in this, or another state, as preliminary merely to the construction of a line of telegraph in this state. There is nothing either in the pleadings or in the proofs to show what the fact may be as to this, and therefore without dissolving the injunction, which we think under the peculiar circumstances may stand for the present, the court will permit the pleadings to be amended in order to show the fact, the truth being, as is said, that the contract was made out of this state.

Ordered accordingly.

WILMER S. LAMB, Assignee of the WINNESHIEK INS. CO. vs BARTON BOWSER.

Circuit Court.—District of Indiana.—February, 1877.

1. Foreign Corporations.—Non Compliance by Agent with Statute of State.—Where an agent of a foreign insurance company, not authorized to make contracts for the company, but only to receive money, or proposals, or premium notes, and forward them to the company for its action, receives from a person in Indiana a proposal for insurance and a premium note, and forwards the same to the company in Illinois, the fact that the agent has failed to comply with the requirements of the statute of Indiana regarding foreign insurance companies doing business in that state, constitutes no defense to a suit brought upon such note.

2. Contract.—When Valid.—This is not a contract made by the agent of a foreign corporation, within the meaning of the statute declaring that foreign corporations shall not enforce, in any of the courts of the state, contracts made by their agents before a compliance with the provisions of the statute, but the contract was made with the company itself, the agent being simply a conduit.

3. Semble.—A policy of insurance issued upon the receipt of such proposal and premium note, to the maker of the note, would be valid, and could be enforced against the company.

This was a suit brought in the District Court by the assignee of the Winneshiek Insurance Company against Barton Bowser, on a premium note given on a policy of insurance. The Insurance Company was a corporation created and doing business under the laws of the state of Illinois. The note, the subject of the suit, was executed in 1863, by the defendant below, who at that time lived in Noble county, in this state. The note was made payable to the Winneshiek Insurance Company. At that time, in Noble county, there was an agent of the company who received from the defendant below the note and a proposition for insurance, which he

forwarded to the Insurance Company, at Freeport, Ills. The note and proposition were received by the company at their place of business in Freeport, and were accepted by the authorized officers of the company, and the policy was issued to the defendant below, insuring property in this state. It was forwarded by the company to the defendant by mail.

The agent was not authorized to make contracts for the company, but only to receive money, or proposals, or premium notes, and forward them to the company for its action.

This was all done without the agent having complied with the law of this state, which operated on the agents of foreign insurance companies, or rather, of foreign corporations, which it was insisted had been decided by the Supreme Court of this state to include foreign insurance companies.

The District Court decided in favor of the plaintiff, whereupon, defendant appealed to this court.

Harrison, Hines & Miller, for defendant.

McDonald & Butler, for plaintiff.

Drummond, J.—It is conceded that the questions involved in this cause turn upon the construction of an act of the legislature of this state, of June 17th, 1852, entitled: "An Act respecting foreign corporations and their agents in this state." This being a suit on a premium note, the question is, whether the note is invalid under the law of this state. This statute declares that the agents of corporations, not organized or incorporated under the law of this state, before they enter upon the duties of their agency, are to do certain acts recited in the statute; they must file their authority or commission to act as agents, and perform various other prerequisites. The object of the statute seems to have been to protect the citizens of this state, in entering into contracts with insurance companies created by other states, through their agents. And it provides that process might be served

upon the agents which should be good against the insurance companies.

The fourth section of the law declares that these foreign corporations shall not enforce in any of the courts of this state, any contracts made by their agents, or persons assuming to act as their agents, before a compliance by the agents with the provisions of the statute.

The fifth section declares what shall constitute an agent. Any person directly or indirectly receiving or transmitting money, or other valuable thing to, or on account of, such corporation, or who shall in any manner make or cause to be made any contract, or transact any business for, or on account of, any such corporation, shall be deemed an agent, subject to the provisions of the act.

The seventh or last section imposes a penalty upon an agent acting for foreign corporations, who neglects or refuses to comply with the provisions of the act.

It is substantially conceded that the agent in this case violated the provisions of the law, and subjected himself to its penalties, and this being so, Were the policy and the note which were executed in this case invalid and inoperative? It is said no action could, in such case, be brought upon the policy, if there had been a loss under it, and no action could be brought upon a note which might be given as a premium upon the policy.

We have to start with a distinct declaration in the act, that there are certain contracts not enforceable in the courts of the state, in connection with the subject-matter of the statute, viz: Those contracts which are made by the agent of such foreign corporation.

Does it follow as a necessary consequence, that because the statute has declared that an agent cannot do certain things except upon complying with the prerequisites named in the statute, that all the contracts are invalid? We have considered the question in this court in relation to these

contracts in the case of *Lamb vs. Lamb*, 6 Bissell, 420. The District Court of this district decided that a policy of insurance made by an agent, and a note in violation of the law of the state in relation to these corporations, were invalid, or rather, to speak more correctly, the note which was the subject of suit there, and not the policy, was held by the District Court to be invalid, and that judgment was affirmed by this court. In doing so we followed the decisions of the Supreme Court of this state, and in a construction of a statute of this state, wherever we can ascertain that a point has been decided under the statute by that court, it is our duty to follow that decision. Has the point in this case been decided by the Supreme Court of this state? Now, we concede that if a note is made in this state by an agent of a foreign corporation, and the policy issued here, the agent, in other words, making the contract for the corporation with the insured, we have to declare whenever a suit is brought upon a premium note on such policy, under the fourth section of this statute, that it is invalid because it is within the terms of that section.

We will examine some of the decisions in this state, bearing on the question. The first case is *The Rising Sun Insurance Company vs. Slaughter*, 20 Indiana, 520. That case did not decide upon the validity or invalidity of a contract of insurance directly, but only indirectly. It was a case upon a policy of insurance, which declared that it was to be invalid unless any subsequent insurance was indorsed upon the policy; other insurance was taken out in this state with the agent of a foreign insurance company, and in answer to a suit upon the first policy, the underwriter said that it had been rendered invalid in consequence of taking out other insurance which had not been indorsed on the policy, and the reply was, that that did not render the policy void, because under the laws of Indiana, the second policy was of no effect, being made with the agent of a foreign insurance company, contrary to the laws of the state. And the court so held.

It is not necessary for me to give an opinion, whether or not this decision is correct. It was not a suit directly on the second policy, and all that is decided in this case is, that a policy thus made in Indiana, by the agent of a foreign insurance company, is invalid.

The next case to which it is necessary to refer, is *The New England Fire and Marine Insurance Company vs. Robinson*, 25 Indiana, 536. This was a case where there was a proposition forwarded to the president of a foreign insurance company, who, by letter to the agent, accepted the risk to the amount of $1,000.00, and a parol contract was thereupon made with the agent for the insurance for one year. There was a policy following this contract of insurance, which the court says was made by the agent. The court held that the policy, as such, was not a valid policy, but that the contract of insurance was a valid contract, and bound the company, and in the decision which the court gave upon the subject, it said: "It is urged in argument that the complaint is bad for not showing a compliance, by the local agent of the company, with the requirements of the act respecting foreign corporations. It is contended that under this law all contracts of foreign corporations are void, and that the exception to the rule is where they comply with its provisions, and that the complaint must therefore show such compliance. We do not so regard the statute." And the court decided that the contract, as a contract of insurance, was a valid contract, because the object of the statute was to protect the citizens of this state. The non-compliance of the agent with certain requirements of the act, did not prevent it from operating against the insurance company.

It will be seen that some of the principles decided in this last case are not precisely in accordance with the case reported in the 20 Indiana.

The next case to which it is necessary to refer is that of *The Union Central Life Insurance Company vs. Thomas*, 46 Indiana, 44. In that case the court decided that the

prohibition against foreign insurance companies doing business in this state without compliance with the statute, extended to the company as well as to the agent of the company. This, it is to be observed, was a decision under the act of 1865, and not under the act of 1852. The statement of facts is not very clear in the case, but it is fairly inferable that the contract which the court held inoperative, was a contract made between the insured and a foreign corporation, through its agent, and, therefore, if the act of 1852 did operate upon the contract, it would be within the very terms of the fourth section of that act.

These are all the decisions in this state that have been referred to as having a direct bearing upon the questions involved in this case, and they go no further than this, as I understand them, that if a contract is made with an agent of a foreign insurance company in this state, then the note given for the premium and the policy of insurance, issued for the benefit of the insured, are both equally invalid; and if that were this case, we should have to hold the note in suit here invalid, but, as will have appeared from the facts stated, this was not a contract made with the agent of a foreign insurance company. The facts contradict that, and expressly show that the agent of the foreign insurance company had nothing more to do with the contract than to receive the proposal and the note, and forward them to the company. That being so, is it true that because one of the factors which go to make up the sum of the contract between the foreign insurance company and the insured in this state, is made by the agent, therefore, the whole contract is void, although it may be but a small part of the sum total necessary to make the contract?

The language of the statute which we are considering is, that the contract shall not be enforced if made by the agent of a foreign corporation. This contract was not thus made. It is not material whether we consider this as an Indiana or an Illinois contract. The note was executed in Indiana,

payable to the insurance company. It, with the proposal, was intended to be forwarded to the insurance company for its action. There was no contract, for the minds of the parties had not met, until the company had acted upon the proposal and the note, and issued the policy. Then the contract was complete. If the defendant below, instead of giving the note and the proposal to the agent of the insurance company, had gone himself to Freeport, there certainly could have been no objection to the execution of the contract under such circumstances. If he had sent the note and the proposal by mail, and they had acted upon them, and forwarded the policy to him, as they did, it could hardly be claimed that would be an invalid contract. If he had sent an agent with the note and proposal, and the agent had returned with the policy and given it to him, that certainly would not have been an invalid contract. Instead of doing any of these things, he gave the note to the agent of the company, who forwarded it and the proposal. He did not even receive the policy, but it was forwarded by mail, as has been stated, by the company, to the insured. Now, as I understand, there was nothing in any law of this state at that time which prevented a citizen of this state from making a contract with a foreign insurance company, for the insurance of his property in this state. It is not necessary to decide whether there could be any such law; there was not in 1863. I take it for granted, therefore, that the contract of insurance was not subject to any objection simply because it was made between a citizen of this state and a corporation of Illinois, but only because there was an agent who did something in relation to the contract—took some of the initial steps which went to make up the whole of the contract, and was acting for a corporation. I regard as having an important bearing on the decision of the question involved in this case, another one, viz: Whether or not the policy issued was binding upon the company. The two are necessarily connected together. If the note was invalid, the policy ought not to be

valid; if the policy was valid, the note, it would seem, ought also to be valid. In the argument it was stated that it might be that this contract of insurance was a valid contract against the Illinois company, but it did not follow that because it might be enforced in the courts of Illinois, that therefore the note which was given as a premium for the policy, could be enforced in this state.

I can have no doubt that in this case the policy was valid against the corporation. If we are looking to the protection of the citizens of this state, we may declare that when a policy of insurance has been issued by a foreign company, and there has been an irregularity or technical non-compliance with some of the conditions of the law, on the part of its agent in this state, that it shall not, therefore, when it is called on to pay its policy, have the right to claim that it is exempt from liability because of the wrongful act of its agent.

If there had not been the provision of the fourth section of the statute of 1852, there might have been great force in the argument which is made; but when a statute has declared what kind of contracts, with reference to the subject-matter of the law, shall not be enforced, it seems to constitute a strong reason in favor of the conclusion, that contracts not coming within the terms of the law are not necessarily rendered invalid. If the statute had said that all contracts made by a foreign insurance company, in which an agent in this state had any part, or with which he had anything to do, were invalid, then, of course, the court would have to declare that the law must be complied with. The trouble, as it seems to me, about this defense, is that the statute does not go far enough; we have to infer, because the act of the agent is invalid, and he subjects himself to a penalty, that therefore, whatever contract is made of which his act forms any part, is necessarily, also, invalid. There can be no doubt that it is the natural desire of a court to hold parties up to their contracts, and especially contracts of this kind, where if they

are held inoperative, the consequences may be so serious. It is competent for the state to legislate to the extent it chooses, as the law now stands—whether it will always be so I am not prepared to say—for the exclusion of foreign corporations from its territory; it may declare that there shall be no agent in the state permitted to have anything to do with a contract which may ultimately be made by a foreign corporation; it may go even to the destruction of all its business relations with citizens of this state, but it has not yet so done; it has only legislated in a particular direction; it has subjected agents to a penalty, but it has only said that contracts made by them shall not be enforced in the courts of this state. We have followed the decisions of the courts of this state. If we had found any case which had come up to this, then we should have followed it; there not being any such case, we think we are at liberty to follow our own ideas of right and of the law.

It is not necessary to refer to the numerous cases from other states which were cited in the argument. I have not found that any state has gone further than the Supreme Court of Indiana in its construction of the law excluding corporations from its limits. But I will refer to one which was mentioned as being conclusive on this case, *Reynolds vs. Geary*, 26 Connecticut, 179.

That was a case where a citizen of Connecticut, had made a purchase of liquors in the state of New York, and had brought them to the state of Connecticut; the purchaser had given a note in New York for the amount of the liquors, and that note was sued on in the courts of the state of Connecticut. The plaintiff knew that the liquors were to be brought to Connecticut, in violation of the law of that state, and sold them with that intent. The statute was to this effect: "And no action of any kind shall be maintained in any court of this state for spirituous or intoxicating liquors or mixed liquors, of which part is spirituous or intoxicating, sold in any other state or country, contrary to the law of said state or country,

or with intent to enable any person to violate any provisions of this act." The case was not within the former clause of the section, viz: It was not sold contrary to the law of the state of New York; it was admitted that the contract was valid under the law of the state of New York, but it came under the last clause of the section; it was done with intent to enable a person to violate the provisions of the statute of Connecticut, and therefore, the court held that the contract could not be enforced in the courts of that state. It is to be observed that there was a very nice point in that case, and it was only on the ground that the state of Connecticut had a right to legislate in relation to spirituous liquors and the use of them as tending to injure the public morals of the state, that the contract was declared to be invalid, because, unless it came within that principle, the state of Connecticut had no right to legislate upon the subject, because it would be an interference with the commercial power of the nation.

It cannot be pretended, I think, that the state of Indiana can declare that one of its citizens cannot go to Cincinnati and buy a cargo of corn to bring into the state, although it may be true, and it has been decided that it can declare that a citizen of the state cannot go to Cincinnati and make a contract for spirituous liquors, and bring them into the state to be used in the state, but the reason why the legislature has a right to declare that liquor shall not be brought into the state to be used here, is because it tends to injure the public morals. This case in Connecticut was, therefore, a contract where the legislature of the state was explicit, and put its prohibition in language that could not be mistaken, against its enforcement. I think that case does not, in any respect, interfere with the principles on which we decide this case. As I said before, the statute of this state might have gone further than it did. It has only gone so far as to declare that certain contracts shall not be enforced.

The judgment of the District Court is therefore affirmed.

For the opinion of the District Court in this case see *ante* p. 315.—[*Reporter*.

HERMAN VOGLER vs. EDWARD SEMPLE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH, 1877.

IN EQUITY.

1. RE-ISSUE.—The general principle in all re-issues is, that there can be nothing given in the re-issue which was not in the original specifications or drawings, although some minor amendments have been at times allowed.

2. CLAIM AND SPECIFICATIONS.—The claim must be for something so described in the specifications that any person of ordinary mechanical skill, or skill in the art covered by the patent, can, from the specifications, make a mechanism which will contain the claim.

3. REMOVABLY HINGED TRUNK TRAY.—The Plumer patent for a removably hinged trunk tray is an infringement upon the Vogler patent.

Munday & Evarts, for complainant.

N. C. Gridley, for defendant.

BLODGETT, J.—This is a bill in equity for an injunction, and an account of profits and damages for an alleged infringement of a patent granted by the United States to the complainant, January 11th, 1867, for an "improvement in trunks," being a re-issue of an original patent of the same substantial purport, dated October 6, 1874.

The answer denies the infringement, and also that complainant is the original and first inventor of the device set forth and claimed as new in his original and re-issued patent.

Complainant's patent is for a removably hinged tray in the body of a trunk; the parts being so arranged and combined as to admit of the ready removal of the tray from the trunk, and yet so adjusted as to allow the tray to be turned up on its hinges, into or against the cover or top. This is accomplished

by the peculiar form of the hinge—one leaf of which is permanently fastened to the tray, and the other so arranged as to be inserted in sockets, which are firmly fixed to the back wall of the trunk; the whole being so arranged as to admit of a ready removal of the hinged tray from the trunk, and so adjusted as to allow it an up and down play.

Three obvious advantages are obtained by this hinged removable tray: *first*, the ready removability of the tray from the trunk when desired; *second*, such a combination or arrangement as shall make the tray removable by a straight vertical lift, so as not to disarrange the contents; *third*, the free up and down play or movement of the tray, so that it will readily adjust itself to the pressure from the contents above or below—this latter is accomplished by giving such length to the loose or free leaf of the hinge as may be necessary to attain the result.

There is no evidence in the case that any one had ever so hinged a tray in the body of a trunk as to permit of its removal, or to give a tray the peculiar characteristics of complainant's device.

In 1866, one Plumer obtained a patent for a tray removably hinged in the lid of a trunk. His original device, however, had none of the peculiar characteristics of complainant's tray. His claim was * * "attaching the tray C to the upper portion of the trunk by means of slots and pins substantially as described." He does not describe a device capable of being applied to the body of a trunk, so as to produce a removably hinged tray like complainant's.

Between the issuing of the patent sued on and the commencement of this suit, one Romadka (who is defendant's vendor, and, as it was stated on the trial and not denied, is defending this suit), obtained an assignment of the Plumer patent, and has had a re-issue. And in this re-issue, dated March 21, 1876, he is allowed two claims:

1st. "A trunk provided with a removably hinged compartment tray.

2d. "A trunk and, in combination therewith, a compartment tray removably hinged by means of socket bearings D, attached to the trunk, and pins attached to the compartment tray, substantially as herein described, and for the purpose set forth."

The hinge described in the re-issue is the same as in the original. And while the first claim allowed in the re-issue is for "a trunk provided with a removably hinged compartment tray," yet there is no description or specification by which we are taught how to place a removably hinged tray in the body of a trunk. The whole description refers to placing the tray in the lid, and nowhere else.

It is well understood by all patent lawyers that the claim must be for something described in the specifications, so that any person of ordinary mechanical skill, or skill in the art covered by the patent, can, from the specifications, make a mechanism which will contain the claim. Now here is nothing, in this Plumer re-issue, which tells how to put a removably hinged tray in any part of the trunk, except the lid. It does not describe how it could be adapted to the body, nor any provision for any other hinge than the pintle and socket hinge. The general principle involved in all re-issues is, that there can be nothing given in the re-issue which was not in the original specifications or drawings, although some minor amendments have been at times allowed in the original specifications or drawings, for the purpose of more accurate and specific description. That is to say: the re-issue cannot be made to cover anything which was not in the original invention. The only purpose of a re-issue is to enable one who has, by a mistake or inadvertence, not taken what he was entitled to in his original patent, to obtain it. The re-issue was only intended to cover omissions of the patent office or of the inventor, in not claiming that to which he was entitled as an inventor. It therefore seems very clear to me that the defendant takes nothing for the purposes of this case by his re-issue. Indeed, it is hard for me to understand

how the broad claim number one could have been allowed under the specifications in the original or re-issued patent, it being manifest that Plumer only intended to describe and patent a device for hinging a tray in the top of the trunk, by his particular pintle and socket hinge. This being all the proof as to prior use, I have no difficulty in arriving at the conclusion that the defense, for want of novelty, is not made out.

As to the question of infringement, the proof shows that defendant has sold a trunk with a removably hinged tray in the body of the trunk. His tray responds in a degree to all the peculiar qualities of complainant's tray; that is, it is removably hinged, so as to admit of being taken out by a straight vertical lift; and is adjustable, in a degree, to the contents of the trunk above or below. He does not use the specific form of hinge described by complainant, but complainant does not confine himself to any particular form, reserving the right to adopt any hinge which will give the substantial results claimed for his device.

The question is: does complainant's patent protect him in the exclusive right to hinge a tray in the body of a trunk so as to secure the results obtained by his device, or is he limited to the special mechanical devices by which those results are obtained?

I am of opinion that, as there is no evidence that any one ever made a removably hinged tray in the body of a trunk, complainant is entitled to the broad claim allowed him in his patent, for:

1st. "In a trunk, and in combination therewith, a tray, removably hinged in the body of the said trunk, substantially as and for the purposes set forth.

2d. "In a trunk, a compartment tray, provided with the strap hinges in combination with sockets attached to the back and inside of the trunk body, substantially as described for the purpose of removably hinging the tray."

That is to say: any device which secures substantially the

same results as complainant's, by the same or equivalent mechanism, is an infringement on complainant's patent. The defendant does not use Vogler's strap hinge and socket, but in place of it he uses a hook and socket, or roller and socket—not the pintle and socket of Plumer, but a hook attached to the back wall of the trunk, and a roller fastened to the back and upper edge of the tray, so as to engage with and rest upon the hook; the two when in juxtaposition making a hinge which performs the substantial functions of complainant's hinge, except that for lack of the elongated strap it is more readily disengaged; but when the parts are together, it operates in all essential particulars as the equivalent of complainant's strap hinge. I am, therefore, of opinion that defendant's tray is, in all its material features as a removably hinged tray, an infringement of complainant's patent.

The defendant's hinge is, as above stated, a roller hook, or bar, projecting from the back of the tray, and lying parallel therewith, and a socket-like lip or catch fastened to the back wall of the trunk. The bar drops upon the lip to make the hinge. It will be readily understood, that upon lifting the tray, the parts of this hinge are separated at once; while in Vogler's strap hinge, the parts remain engaged until the strap is lifted entirely out of the socket. It is in effect the same as the Vogler, if you should cut off the Vogler strap very short. So that I can have no doubt that the defendant's method of hinging the tray is a method substantially equivalent to the Vogler method. And while Vogler may not be in a position to invoke the broadest doctrine of equivalents, yet he is in a position to invoke the doctrine to this extent, at least, that he is entitled to the method of hinging the tray in the body of a trunk by his mechanism, or any mechanism operating substantially like his, and which produces the same results.

The doctrine of equivalents in this respect has been elucidated very fully and clearly by the Supreme Court in

the Tuck Creaser cases recently decided, and which went up from his Honor Judge DRUMMOND. The extent to which a patentee is entitled to invoke the doctrine of equivalents, is there very ably and clearly discussed; and I think I am entirely within the rule in that case, when I say that I have no doubt but that the defendant in this case has infringed upon the Vogler patent by the adoption of the hinge which is now before me.

There will be a decree for the complainant, with a reference to the Master to take proof and report as to damages.

The opinion of Judge DRUMMOND in the Tuck Creaser cases will be found in the 6th Vol. of this series, *Fuller vs. Yentzer et al.*, p. 203.—[*Reporter.*

In re AUGUST HERPICH.

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—MARCH, 1877.

IN BANKRUPTCY.

1. WARRANTS OF ATTORNEY.—Warrants of attorney given by a debtor to his creditor, even when given more than two months before bankruptcy proceedings, are fraudulent if the creditor knew at the time they were given that the debtor was insolvent.

2. ILLEGAL PREFERENCE.—If, under such warrant of attorney, the debtor gets judgment and levies an execution, he will not be allowed to have a preference.

3. Conflicting decisions of the United States Supreme Court cited and commented upon.

Petition of several creditors of the bankrupt, for a review

of an order of the District Court, in refusing to allow them a preference.

Tenneys, Flower & Abercrombie, for petitioning creditors.

Mr. Littler, for assignee.

DRUMMOND, J.—On the 5th of February, 1876, the bankrupt being indebted to various parties, gave to the petitioners in review, for a debt previously due to them for goods sold and delivered, eight promissory notes, amounting altogether to $1,893.35. These notes were respectively payable at sixty and ninety days, and at four, five, six, seven, eight and nine months after date. Accompanying these notes were warrants of attorney, authorizing judgment to be entered at any time after they were executed for the amount that might be found due at the time. Accordingly, on the 12th of April, a little more than two months after the notes were executed, judgment was entered up in the Superior Court of Cook County, for the sum of $2,078.48, being the amount due at the time, the notes all drawing ten per cent. interest from date. An execution was issued on the same day against the bankrupt, and a levy was made by the sheriff on his property. On the 22d of April, ten days afterwards, a petition in bankruptcy was filed against the bankrupt, and the petitioners in review were enjoined by the District Court from proceeding further with the sale under their execution, and the property was placed in the hands of an assignee, who was afterwards appointed, and who sold it, and the proceeds were paid into court, and thereupon these petitioners in review made application to the District Court to have the whole of their judgment paid in preference to the claims of other creditors.

This application was refused by the District Court, and the question now is, whether the refusal was correct. I think it was. I have to assume upon the facts in the record of this case, that at the time these notes were executed and warrants of attorney given, the bankrupt was insolvent, and proceed-

ings in bankruptcy imminent. It was not a case of actual insolvency, unknown to the bankrupt, but one of insolvency known to him to be such at the time the notes were executed. It was also known to the petitioners in review that he was insolvent at the time they took the notes and warrants of attorney, and the question is, whether on such a transaction taking place, notes given, and warrants of attorney to confess judgment, and insolvency known and understood on both sides, and a petition in bankruptcy filed, though more than two months afterwards, it can stand as a valid security against the other creditors. Now, it is true, that the Supreme Court has decided in the case of *Wilson vs. The City Bank*, 17 Wallace, 473, that an insolvent party may be sued, and the creditor may obtain a judgment, and there may be no defense, and the creditor may know the party to be insolvent, and yet, if the suit is thus brought in the usual course of litigation, and undefended, judgment obtained, and execution issued, the creditor has obtained a valid prior lien upon property levied upon, as against other creditors.

This case rather took the profession—certainly a great many of the District Judges, who had decided otherwise—by surprise, as it seemed to be making an attack upon what was supposed to be one of the principles of the bankrupt law, that where a party was insolvent and did anything or intended to do anything by acquiescence merely, producing such a result, he thereby allowed, or suffered some of his creditors to get a preference over others; but in the case referred to, it will be observed, that the court qualified the decision by saying, that very slight circumstances on the part of the bankrupt might be sufficient to invalidate the lien. It is also true that in the case of *Clark vs. Iselin*, 21 Wallace, 360, and in the case of *Watson vs. Taylor*, in the same volume, p. 378, the Supreme Court has made decisions which some of us who are called upon to administer the bankrupt law practically, thought, was going very far and interfered seriously with the settlement upon equitable principles of the rights of creditors to a bankrupt

estate. The court decided that a party might give notes with warrants of attorney to confess judgment when he was solvent at the time, and the creditor to whom they were given might put the warrants in his pocket and hold them for an indefinite time, unknown to all who dealt with the debtor, and as soon as there was any apprehension, or it was thought necessary for the protection of his interest, he could take out these warrants of attorney, file them and have judgment entered up and execution issued, and thus obtain a preference.

These decisions were made under a strong dissent by three of the judges, who dissented upon a principle, which for my own part I have always thought sound, namely, that when a warrant of attorney to confess judgment was given, it was a continuing power, and when the creditor entered up judgment on the warrant of attorney, it was at the time the act of the debtor, through or by his attorney, the power continuing to operate;—but the majority of the court thought otherwise.

They say that it was the act of the debtor at the time it was executed, but did not become his act at the time that the warrant of attorney was entered up by a judgment; that was the act of the creditor, they say. We are bound, of course, by the decision, but it always has seemed to me a hard rule for the other creditors that a man should be permitted to go on and do business, indefinite in amount and time, with any number of warrants of attorney to confess judgment placed away in the pockets of some of his creditors, ready to be entered up at any time whenever his pecuniary condition should become precarious, but it has been so decided, and we submit, and if this were that case, we would follow that decision; but it is not. One of the grounds upon which the Supreme Court has put its decision in the cases named is, that at the time the warrants of attorney were executed, the party who gave them was solvent, though afterwards he may have become insolvent; that it was a valid security at the time; and although they refer to the 35th section of the bankrupt

law, still it is very clear, both from the opinion of the majority of the court in *Clark vs. Iselin*, as well as of the minority in *Watson vs. Taylor* (a minority which dissented in both cases), that the decision of the cases was put upon two grounds. *First*, upon general principles of law, the majority declaring that, resting upon them, their conclusions were sound; and *secondly*, that the act in question was not rendered invalid by the 35th section of the bankrupt law. The minority maintained that it was invalid on both grounds.

It is to be observed that the judge who wrote the opinion in *Wilson vs. The City Bank*, dissented in *Clark vs. Iselin* and in *Watson vs. Taylor*—and see his comment on his own opinion in *Little vs. Alexander*, 21 Wallace, 503. These warrants of attorney were not technically invalid under the 35th section of the bankrupt law as it now stands, for while formerly the act must have been done within four months of filing the petition in bankruptcy, as the section was amended in 1874, it required only two months in involuntary bankruptcy; but there is an element in this case which is not necessarily involved in the 35th section. It may happen that a man may be insolvent and not know it. He may be contemplating insolvency and be solvent at the time.

In the case now before us, however, there was something more than what was required by this section. Here the bankrupt was not only insolvent at the time he made the warrants of attorney, but he knew it, and the creditors knew it also. The bankrupt necessarily knew the consequences of his own act, and it is clear the warrants of attorney in this case were given and received for the purpose of enabling these creditors in review to obtain a preference over other creditors. It is manifest, too, if we examine the language of the majority of the court in the case of *Clark vs. Iselin* (page 373), that they place great stress upon the fact that at the time there was something valuable passed from the creditor to the debtor, who gave the warrant of attorney, because, they say, the question of unlawful preference would depend upon

whether there was a present consideration, or it was for a pre-existing debt.

Now in this case, these warrants of attorney were given for a pre-existing debt. So that I think upon general principles these warrants of attorney were a fraud upon the law by the bankrupt and the petitioners in review, and I do not feel inclined to follow the cases of *Clark vs. Iselin*, and *Watson vs. Taylor*, unless it appears that the case before me is brought necessarily within their terms; and as this case is not, I hold that the District Court decided rightly, and that these warrants of attorney were a fraud upon the law, and that these petitioning creditors would obtain an unjust preference if their petition to the District Court to allow the the whole of their claims to be paid were granted.

Judgment of District Court affirmed.

THE NAPOLEON.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1877.

IN ADMIRALTY.

1. WAIVER OF MARITIME LIEN.—In the absence of express contract of waiver, or of an agreement that a note shall be taken in actual payment, a maritime lien is not waived or extinguished by giving credit for a limited time, nor by the acceptance of a note for the amount due on account of the service which is the foundation of the lien.

2. SURRENDER OF NOTE.—In the case of a note taken it is necessary that it should be surrendered at the hearing.

3. DISCOUNT OF THE NOTE.—Although a maritime lien is strictly personal and is not assignable, yet if a note taken without waiver of the lien is discounted by a bank upon the indorsement of the person having the lien, and the indorser afterwards takes up the note, he still can enforce his lien, as such a transfer of the note does not extinguish it.

4. PURCHASER WITH KNOWLEDGE OF LIEN.—The above principles apply where the vessel had been purchased by persons knowing of the existence of the lien.

5. Many cases cited and commented upon.

In 1873, Tyson, Sweet & Co. were the owners of the schooner Napoleon. The libellants composed a firm known as The Milwaukee Tug Boat Line, and were the owners of tugs engaged in towage service at the port of Milwaukee. Between the 13th of July, 1873, and the 19th of December of the same year, libellants' tugs rendered towage service for the Napoleon to the amount of $359. In February, 1874, the claimant purchased the vessel from Tyson, Sweet & Co., and received a conveyance. On the 12th day of May, 1874, the libellants took from Tyson, Sweet & Co. their note for the amount due for such towage service, payable in thirty days, which note included the amount due for a similar service

rendered for the schooner Jason Parker, which vessel had been at the time of such service owned by Tyson, Sweet & Co., and was sold and conveyed to claimant at the same time that he received a conveyance of the Napoleon. Prior to the maturity of the note, the libellants presented it to the Second Ward Savings Bank, with their indorsement thereon, for discount. The note was discounted by the bank.

When the note fell due, it was presented to the makers for payment, was not paid, was protested for non-payment and notice given to the indorsers, the libellants. Libellants thereupon paid to the bank the amount due upon the note, and it came back to their hands. They then filed a libel against the vessel, thereby asserting a maritime lien for the towage service on account of which the note was originally given, and at the hearing surrendered the note.

H. H. Markham, for libellants.

N. J. Emmons, for claimant.

DYER, J.—For the towage service rendered by the libellants, they had a lien upon the vessel. Upon the testimony I must find that the claimant purchased with knowledge of libellants' claim. He therefore acquired and held title subject to the lien. Subsequent to the conveyance of the vessel, the libellants took from the former owners, their note for the amount due on account of the towage service. The lien existed and was in full force at the time the note was taken notwithstanding the previous purchase of the vessel by the claimant. The first question presented, is, did the acceptance of this note operate as a waiver of libellants' lien. The discussion of this question is unnecessary, since it is settled upon authority that in the absence of express contract of waiver, or of agreement that a note shall be taken in actual payment, a maritime lien is not waived or extinguished by giving credit for a limited time, nor by the acceptance of a note for the amount due on account of the service which is

the foundation of the lien.[1] In the case of a note taken, it seems essential to the maintenance of a libel *in rem*, that the note be surrendered at the hearing.

Ramsay vs. Allegre, 12 Wheaton, 611, is not in antagonism to the cases cited, and is to be distinguished from them. In that case the material man had received a negotiable note for the amount of his demand. The note was still outstanding when the libel was filed. It had not been surrendered, and it did not appear that it had not been negotiated and that it was not then in the hands of a third party. These being the circumstances, the Supreme Court held that the libel could not be maintained, resting the decision upon the fact that the note had not been given up or tendered at the hearing.

In the case at bar, the proofs tend to show, not only that it was not agreed, when the note was taken by libellants, that it should be received in absolute payment of their claim, but that it was understood that libellants' lien should be unaffected, and that if the note should not be paid, recourse would be had against the vessel.

The remaining and principal question in the case is this: Did the subsequent negotiation and transfer of the note by libellants to the bank, extinguish the lien? Libellants placed their indorsement on the note and presented it to the bank for discount. The bank discounted it on the strength of the indorsement, held the note till due, then presented it to Tyson, Sweet & Co. the makers, for payment, and upon its non-payment, protested it and gave notice to the indorsers, who paid the bank and took up the note. Was the lien, by this transaction extinguished? Or, upon the note coming back into the hands of the payees unpaid by the makers, Could they, on surrender of the note, maintain proceedings against the vessel?

1. *The Brig Nestor*, 1 Sumner, 74; *The Barque Chusan*, 2 Story, 456; *Schooner Active*, Olcott's Reports, 286; *The Eclipse*, 3 Bissell, 99, and cases there cited; *The Gate City*, 5 Bissell, 200; *Harris vs. The Schooner Kensington*, 8 Law Register, 144; *The Kimball*, 3 Wallace, 37; *The Emily Souder*, 17 Wallace, 666; *Raymond vs. The Schooner Ellen Stewart*, 5 McLean, 269.

Whatever doubt once existed as to the assignability of a general maritime lien, the question has been put at rest by repeated adjudications. The lien of a salvor on account of salvage service, of a mariner for wages, of a material man for repairs or supplies, is strictly personal and does not pass to his assignee. The same must be said of a lien for towage. It is equally well settled that an assignment or transfer of the claim which constitutes the basis of the lien, extinguishes the lien.

The question whether the assignment by a mariner of his claim to unpaid wages, confers upon the assignee a right to maintain a suit *in rem* for the recovery of such wages, was fully discussed in the case of *The Patchin*, 12 Law Reporter, 21, and was answered in the negative. A distinction was taken between a claim of this character, and bottomry bonds, which are assignable because they are express hypothecations and bind the ship to the lender and his assigns, and bills of lading which are made negotiable for the benefit of trade and commerce. The rule that an assignment of a claim to secure which the maritime law gives a lien, divests the lien which originally existed in favor of the holder of the claim and confers no right in the assignee to claim reimbursement in a court of admiralty, was also laid down in the following cases. *The Barque Geo. Nicholaus*, 1 Newberry, 450; *The Æolian*, 1 Bond, 267; *The Freestone*, 2 Bond, 234; *Reppert vs. Robinson*, Taney's Decisions, 492; *Schooner Kensington*, 8 American Law Register, 144; *The Tug Champion*, 7 Chicago Legal News, 1.

In the case at bar, as we have seen, the claimant purchased the vessel with notice of libellants' claim and lien. He therefore stands in no better position to contest the libellants' rights to a lien, than would Tyson, Sweet & Co. if they were yet the owners of the vessel. The case is not therefore one where the rights of innocent purchasers, without actual notice, are involved. Now, admitting the principle of law before stated, that the assignment or transfer by the original holder of a claim against a vessel extinguishes the lien, Did

libellants, by procuring the note which they had received from Tyson, Sweet & Co. to be discounted by the bank, in fact or effect transfer their claim against the vessel to the bank? If the transaction was such transfer or assignment, then it must be conceded the lien was divested and lost. But I am of the opinion that it was not. The execution of the note, as we have seen, was not a payment of libellants' demand against the vessel. Its acceptance was not a waiver of the lien. The original claim remained unimpaired, and would only be discharged on payment of the note. Pertinent to this point, is the language of Judge SPRAGUE in *Page vs. Hubbard*, 1 Sprague's Decisions, 335; "the creditor has received nothing except another promise of "the debtor to pay the debt. This second promise is indeed "in writing and negotiable, but it is a promise to pay the "same debt. It acknowledges value received, but the only "value received was the materials which went in the ship. "The debt, therefore, cannot properly be said to be satisfied, "merely because there had been two promises by the debtor "to pay it, the one by parol, and the other in writing nego- "tiable." It is true that while the note was outstanding the libellants could not pursue their remedy *in rem*, and this is for the reason, as the courts express it, that the debtor would still be responsible to the holder of the note, and he ought not to be twice liable in any form, on account of the same debt. And that he may not be subjected to this hazard the courts require "the production of the note to be cancelled when the judgment is rendered on the original promise." Though the remedy on the original claim was suspended while the note was outstanding, it does not necessarily follow that the discounting of the note by the bank operated as a transfer or assignment of the original debt or demand. The transaction between libellants and the bank, amounted to an advance of money on the note by the bank on the strength of libellants' indorsement. It was not an indorsement without recourse, but was in form such that upon notice of its non-

payment by the makers, the libellants would become obligated to take up the note. Upon maturity and non-payment, the note came back into their hands, and I think that upon its surrender they were remitted to the privilege they would have had if the note had remained in their continuous possession until due, namely, the privilege to proceed *in rem* against the vessel. The transfer of the note to the bank was accompanied with libellants contingent liability to take it up when due, which liability became absolute on non-payment by the makers and notice. The question I admit is not free from difficulty; but in view of the special circumstances of the case, the claimant having no better right to contest libellants' asserted lien, than would be possessed by Tyson, Sweet & Co. were they still the owners of the vessel, and the note having been discounted upon libellants' indorsement, and having come immediately back to their hands when due, I think it most consonant with correct reasoning to hold, that there was not such an assignment of libellants' claim against the vessel, or her owners, as extinguished the lien. In this view I am supported by Judge BETTS, who, in the case of *The Active*, Olcott's Reports, 287; held, that the taking of a promissory note was not a waiver of a lien on a vessel for supplies, as against a claimant who did not innocently and without notice acquire rights or interests in the vessel, and that while the note remained in circulation or outstanding, it operated as a suspension of the remedy on the lien; but on its surrender by the original creditor he was remitted to his original privilege and could proceed *in rem* against the vessel.

A different view was taken by Judge MAGRATH in the case of *Harris vs. Schooner Kensington*, 8 American Law Register, 144. He admits that where a lien arises under the maritime law it is not waived or lost because a note or bill has been taken for it by the creditor, and that the acceptance of the note is not to be held a payment of the original demand unless so agreed. This conceded, it is then held that a transfer of the note transfers the original debt or claim and thereby extinguishes

the lien, which cannot be revived by taking back the note. I am unwilling to adopt unreservedly this course of reasoning.

It may be observed that the precise point under consideration was not necessarily before the court for decision in either of the two cases last cited, as it did not appear in either case that the note taken by the original creditor had ever been transferred.

Admitting the full force of Judge LONGYEAR'S statement in the case of *The Champion*, *supra*, that the decisions of our own admiralty courts fully sustain the position that the lien which, for example, a material man has, "is strictly "personal to himself, and does not pass to the assignee, that "it is in fact extinguished by the assignment of his claim, so "that neither he nor his assignee can come into a court of "admiralty for its enforcement," I have been unable, after as diligent an examination as I could make, to find a case, where the principle was enforced, which did not upon the facts show an absolute assignment or transfer of the original debt or demand.

In *Reppert vs. Robinson*, Taney's Decisions, 492, the libellant had taken a due-bill for the amount of his claim, produced it at the trial and offered to surrender it. There was an assignment to a third party indorsed on the due-bill which bore date prior to the filing of the libel and which was erased. Judge TANEY in his decision granting a decree, held that as the due-bill was produced by the libellant and offered to be surrendered and delivered up, he must be regarded as the lawful owner, and if it had been assigned, that it had again been returned to the libellant. It is evident that the right to a decree was here considered to rest upon the libellant's ownership of the due-bill when the libel was filed; and upon his offer to surrender it at the hearing; and that the fact that it might had been previously assigned was not deemed material as affecting the lien.

In the case at bar, I rest my conclusion upon the ground, that the transaction between the libellants and the bank, by

which the note was discounted and again taken up, was not a transfer of the original debt or demand so as to bring the case within the principle of those authorities which hold that such transfer or assignment effects an extinguishment of the lien.

Decree for libellants.

In re THE CORN EXCHANGE BANK.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1877.

IN BANKRUPTCY.

1. PRIORITY.—The state has no claim for priority where the Warden of the Penitentiary deposits funds in his own name, as Warden, in a bank which afterwards becomes bankrupt, the Warden being liable to the state on his bond for the amount.

The warden of the state penitentiary received from the treasurer of the state, upon the order of the directors of the penitentiary, $10,000, and deposited it in the Corn Exchange Bank at Waupun, where the penitentiary was situated, in his name as warden. It was to the credit of "H. N. Smith, warden." He had an individual account at the bank at the same time, which was kept entirely distinct from his account as warden. It seems that there was at the penitentiary no safe place of deposit for the money used in defraying the expenses of the penitentiary, and which might be received as the proceeds of the articles manufactured by the prisoners and sold, and therefore, with the consent of the directors, the warden kept this account with the bank.

Almost immediately after this sum was deposited, the cashier of the bank absconded, and the bank failed, and was put into bankruptcy. The state now comes and claims that this money, deposited under these circumstances, was its money, and that the state has priority, and should be first paid in preference to some other creditors; and according to the mode of distribution pointed out in the bankrupt law.

A. Scott Sloan, for state.

E. P. Smith, for assignee.

DRUMMOND, J.—The question is, whether the money was the money of the state, so as to entitle it to a preference over certain other creditors of the bankrupt. The District Court found that it was. The question before this court is, whether that decision was correct. That depends very much, as well upon general principles, as upon the particular legislation concerning the warden of the penitentiary, and the duties he was called upon to perform.

He was appointed by the directors; he was the superintendent of the penitentiary, and the treasurer. He could sue and be sued on contracts connected with the management of the penitentiary, and the supply of materials and provisions. Judgment could be rendered against him, and execution levied upon his property.

He received the proceeds of the labor of the convicts, and all money appropriated by the state for necessary disbursements. It should be added that he gave a bond, as required by law, in the sum of $20,000, for the faithful performance of his duties, and for the proper accounting for all moneys that should come into his hands. Now when he received the money, which, in one sense it might be said belonged to the state—that is, when he received it for the particular purposes of his office, either as the proceeds of the labor of the convicts, or as money directly appropriated by the state, Was he the mere agent of the state, performing the duty of an agent

without any property in the money? If he were, and had nothing to do but the performance of a duty as agent, then, if he lost the money, exercising proper care, or if it were taken from him he would not be accountable. An agent, it is well known, who is simply acting for his principal in keeping money, is not accountable to him for it in case of loss, provided he use reasonable care and diligence in keeping it. Now if, when the warden received, at Madison, the money, or drafts convertible into money, he had lost it in transit from Madison to Waupun, would it have been the loss of the state if he had exercised reasonable care? I think, as a public officer, having given bonds to the state, the state would have a right to say to him that he was not the mere agent for the keeping of this money, but that he had certain duties to perform in relation to it; that he had generally the disbursement of the money; that he could make contracts that contemplated the expenditure of the money; that he had certain personal duties and responsibilities in connection with it; that the state had trusted him with the money, but it was his, for the purposes for which it was placed in his hands.

It is said that the money was deposited in the bank with the consent and acquiescence, it may be under the instructions, of the directors of the penitentiary; still that did not discharge the warden from the duty he owed the state. The law does not clothe the directors, as I understand, with the power to say to him where he should keep the money, or what he should do with it. It may be, contracts were to be made, with the consent of the directors, but he, as the treasurer of the penitentiary, was himself empowered and required by the statute to do certain things in relation to the expenditure of the money.

He is intrusted with the safe keeping of the money, and there would seem to be no doubt that if there should turn out to be a deficiency here, after proper distribution, that the warden himself would be personally accountable for it to the state on his bond, and that he cannot rely upon the instructions of

the directors to relieve himself from that responsibility.

At the time this case was decided by the District Court, its attention was not called to a case in Massachusetts, reported in 11 Metcalf, 129, and which is in all essential particulars precisely like this. In fact, the material provisions of the law upon which the Supreme Court of Massachusetts decided that case, have been re-enacted in the statute of Wisconsin, and therefore that case is applicable to this, and that, curiously enough, was one arising out of the insolvency of a bank. The Phœnix Bank had loaned money to the state. It became insolvent, and its affairs were wound up under the law of Massachusetts. Under the claim against the state the question arose, whether the state had the right to set off certain deposit accounts which had been made in the bank by agents of the state, one of whom was a person who had the management of a bridge across the Charles River, and who was called upon to make disbursements for the repairs of the bridge, and with whom were placed the tolls of the bridge. And also, the bank had on deposit, at the time it suspended, certain moneys deposited by the warden of the penitentiary. It does not appear precisely from what source these moneys came into the hands of the warden.

The warden of the state prison, had deposited the sum of $11,930, which sum on the books of the bank stood credited to "Chas. Lincoln, Jr., warden of Mass. state prison, at Charlestown."

Now it will be observed that the court was required to determine whether the set-off should be allowed in each of these cases,—one, that of the agent of the Charles River bridge, and the other that of the warden of the penitentiary, and therefore the attention of the court was called to the particular circumstances connected with each deposit. In the one case (that of the agent of the Charles River bridge) the court decided that although the state might not have had a legal right to bring a suit, still that it had such an equitable interest in the fund deposited in the name of the agent of the

Charles River bridge, that it could claim a set-off for that money against the claim of the bank for the money which had been loaned to the state. In the case of the warden of the penitentiary, the court decided that the state had no such equitable interest in that fund that it could set it off against the claim of the bank. The opinion of the Supreme Court of Massachusetts was given by Chief Justice SHAW, very high authority, and is very short. He says:

"Can the deposit made by the warden of the state prison be set off? His authority and duty are regulated by the revised statutes, 144, sections 16 and 19. This demand stands upon a very different ground from that of the bridge agent,—a difference depending upon the very different provisions of law under which these agents are constituted. By the revised statutes, the state prison and its officers are constituted a separate and distinct establishment, having powers and functions, and being charged with duties and responsibilities of a peculiar nature." "It is provided that the warden shall have the charge and custody of all the real and personal estate, stock, tools and property pertaining to the prison."

"That he shall receive and pay out all moneys granted by the legislature for the support thereof, and shall keep and render regular accounts." "It is provided that all contracts on account of the prison shall be made by the warden."

"That the warden and his successor may sue and be sued thereon to final judgment and execution. That no such suit shall abate by reason of the office of warden becoming vacant, but that any successor of the warden pending such suit, may take upon himself the prosecution and defense thereof, and that upon motion of the adverse party, and notice, he shall be required to do so."

Similar powers and duties are conferred upon the warden by the law of Wisconsin. Indeed, it is claimed that they have been copied from the statute of Massachusetts. After having cited these provisions of the law of Massachusetts, the court says: "The court are of the opinion that in no sense can the

money thus received and held by the warden of the state prison, in his official capacity, be regarded as the money of the commonwealth, or money in which the commonwealth has any equitable interest. The warden is liable to judgment and execution. Both the obligations of the warden, and the property to meet them devolve upon his successor. The statute contemplates that the commonwealth may have occasion to appropriate money from time to time, should the revenues of the prison be insufficient for its support. But to the extent of those revenues they are placed entirely under the control of the warden, he being subject only to apply them to the purposes of the institution, and to render an account of the manner of their disbursement. And we think it was the intention of the legislature to put the warden in such a situation of responsibility for all contracts made on account of the prison, that persons dealing with him, and making contracts, should not be barred of their legal remedies by being obliged to treat such contracts as made by the commonwealth, who are not liable in their sovereign capacity to be sued."

So that, unless this court should overrule the decision of the Supreme Court of Massachusetts on a statute, many parts of which have been incorporated in the law of Wisconsin, it must so rule this case; and the question which has occurred to the court is, whether that decision is sound under the law. Of course if the court was satisfied that it was not a correct decision, it is not binding as authority upon this court; but after the best reflection I have been able to give the subject, I am inclined to think a sound rule is there laid down. I have already stated that in my opinion the warden cannot relieve himself from responsibility in relation to the funds which, in one sense, it may be, belonged to the state, by showing that he has exercised due care over them ; that he has been guilty of no fault or negligence. I think as a matter of public policy, he is bound to account absolutely to the state for the funds that have been placed in his hands. And it seems to me this consideration acquires additional strength from the

fact that the law makes him personally responsible on his contract, and liable to judgment and execution.

If he had made a contract for the supply of provisions for the penitentiary, and the state had paid over to him the money necessary to meet that contract, and he had deposited it in a bank to his credit as warden of the penitentiary, and he had been sued upon the contract, judgment obtained, and execution issued against him and in the hands of a sheriff, liable to be levied upon his property, could the state come to him and say, "this is not your money; you have no right to use it for the payment of this debt"? Would not, on the contrary, the warden have the right to say, "this money has been intrusted to me for this among other purposes, and you cannot recall it? Responsible as I am under this contract, it is my legal right to hold it and to meet my liability, to relieve my own property from seizure under this execution." I can have no doubt that he would have the right so to do.

A case has been cited which was decided by the Supreme Court of the United States, *William Bayne et al. vs. The United States*, at the present term of the Supreme Court, 93 United States Reports, 642. Of course, if that case, fairly considered, ruled this, this court would follow it; but I think it does not.

That was a case where a paymaster of the army had received $200,000 of the public money for disbursement in the usual way, it is to be presumed, by him as paymaster. He had deposited the money in a bank in Washington. He thereupon entered into a fraudulent conspiracy with Bayne & Co., by which he allowed them, as the result of this conspiracy, to take control of the money for their own purposes, they knowing that it was money which he had as paymaster, and which of course belonged to the United States.

The company became bankrupt, and the question was, whether, under the circumstances, the government had a right of priority of payment as to a portion of this money which this company had received, as against the other cred-

itors; and it was decided by the Supreme Court that the government had this right of priority. But why did the Supreme Court so decide? It was because it was received by Bayne & Co. in pursuance of a fraudulent conspiracy, they knowing it was the money of the government, and held by the paymaster as public money.

The court say that the law imposes on the firm an obligation, and implies a promise on its part to refund the money. Such a promise can be enforced by action.

Now, if the paymaster, as to the money in his hands, occupied the same relations to the government of the United States, that the warden of the penitentiary did to this state; or if the Corn Exchange Bank, of Waupun, had the same relations to the state that the insolvent firm of Bayne & Co. had to the United States, then this decision would apply. But it is obvious from what has already been said, that the distinction between the two cases, between the obligations of the insolvent firm and those of The Corn Exchange Bank, of Waupun, the one to the United States, the other to the state, and the duties of the paymaster in relation to the money, and those of the warden in relation to the money he had, are entirely distinct, and so different as really to prevent that case from being a binding authority upon this court, under the facts in the case before me.

Therefore, I shall reverse the decision of the District Court, and hold that the state is not entitled to a preference over the other creditors for the money which is claimed.

I have assumed the liability of the warden on his bond to the state for the amount. If I thought the state had not this remedy, possibly I should feel inclined to look with a little more favor upon the application which has been made for a priority, but presuming that the state has ample remedy against the warden and his sureties, and believing that the decision of the Supreme Court of Massachusetts is a case precisely in point, and under a law, which, so far as it affects the decision of that court, is the same as the law of Wisconsin, I

must hold that the state is not entitled to priority over the other creditors. Of course the warden will be allowed, as a general creditor, to prove his account.

JOHN E. RISLEY vs. THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—APRIL, 1877.

1. EVIDENCE—PROOF OF HANDWRITING—VARIANCE IN SIGNATURE.—A variance in a signature is not necessarily proof of its being a forgery. Dissimilitude may be occasioned by a variety of circumstances, by the state of health and spirits of the writer, by the materials, by his position, or by his hurry or care.

2. WEIGHT OF EVIDENCE.—If a witness swears that he was present and saw a party sign a disputed instrument of writing, his evidence ought to out weigh the statement of another (both witnesses being equally credible) who testifies that he is acquainted with the handwriting of the alleged signer and that he does not believe the signature to be genuine.

The facts appear in the charge.

Baker, Hord & Hendricks, D. W. Voorhees, Henry Crawford and *Buskirk & Nichols*, for plaintiff.

McDonald & Butler, and *Harrison, Hines & Miller*, for defendants.

GRESHAM, J.—Gentlemen of the Jury: John E. Risley, the plaintiff, recovered a judgment in the Supreme Court of Marion county against the Indianapolis, Bloomington and Western Railway Company for $55,879.

This judgment was appealed to the Supreme Court of this state, and in so doing the bond in suit was filed. The railway company makes no defense, and as to it your verdict will be for the plaintiff.

The defendants, Willson, Nebeker and Gish, who are sued as sureties, each by his separate plea, under oath, technically called *non est factum*, denies the execution of the bond. These pleas present the only issue in the case, and while admitting every other material allegation in the declaration, they throw upon the plaintiff the burden of proving that the sureties did sign the instrument; and in order to justify you in finding a verdict for the plaintiff against any one of the sureties, it must appear by fair preponderance of all the evidence that the bond was signed by that surety. The sureties are not required to prove that they did not sign the bond. The plaintiff has the affirmative of the issue, and unless you think he has supported it, as already stated, by a fair proponderance of all the evidence against all or some one of the sureties, he is not entitled to a verdict.

There is a conflict in the testimony of the witnesses. That conflict is found in the evidence of those who testify from personal knowledge, as well as those who spoke from opinion or belief only. In case of such conflict it is the duty of the jury to endeavor to so reconcile the testimony as to impute perjury to no one. If, however, after carefully weighing all the evidence, you are unable to escape the conviction that there is dishonesty in the case, then you should promptly and fearlessly locate that dishonesty where your judgments and consciences tell you it belongs.

Remembering, then, that the burden of the issue is on the plaintiff, you have the testimony of C. W. Smith that on the 27th day of September, 1872, the day the bond bears date, he wrote a dispatch and gave it to the operator of the company at Indianapolis, to be sent to Crawfordsville, requesting the defendant Willson to meet him at the station at that place on the arrival of the train that day; that Willson did meet

him as requested, when at Smith's solicitation, and in his presence, he signed the bond; that with the bond thus signed by Willson, he proceeded on the same train to Covington; that at the same time that he left with the operator at Indianapolis the dispatch for Willson, he also left a dispatch for Cherry, the operator at Covington, directing the latter to request the defendant Nebeker, to meet him at the station at that place on the arrival of the train the same day; that, arriving at Covington he met Nebeker at the station, where he requested him to sign the bond as surety, and procure still another signature to it; that Nebeker took the bond, saying he would sign it as requested, and then have it signed by his partner, Gish, after which he would send it to Smith, at Urbana. Papers in Smith's handwriting, purporting to be the original dispatches left by him with the operator at this place, to be sent to Willson, at Crawfordsville, and Cherry, at Covington, are in evidence. If you believe these are genuine dispatches, and in fact were sent from Indianapolis to Crawfordsville and Covington, announcing to Willson and Nebeker the coming of Smith, then those circumstances certainly strongly tend to corroborate Smith's evidence.

If, however, you believe those dispatches, or any others in evidence, are bogus; that instead of being genuine, as they purport to be, they have been fabricated in whole or in any material part to corroborate Smith, then you will hardly hesitate about discarding Smith's entire testimony. It seems to be conceded that if the testimony of Smith is not entitled to belief the plaintiff cannot recover. If the bond is a forgery as to the sureties, it is difficult to escape the belief that Smith was concerned in the crime. His employments, both before and since the date of the bond, show that he was a man of sufficient judgment and ability to successfully manage important departments in the operation of large railroad corporations. At the date of the bond he was general manager of the Indianapolis, Bloomington and Western Railway Company, and two of the defendants, Willson and

Nebeker, were directors in that company. What interest or motive could have tempted him to commit such a crime? Is it probable from anything in the evidence that he would thus have forged the name of three well known citizens?

These and like considerations may aid you in weighing the evidence of Smith. The real question, however, which you are called upon to decide is, whether or not the defendants signed the bond? If they did not they are not liable, whether Smith or some one else forged it.

Griggs testifies in his deposition that at the Neil House, at Columbus, Nebeker admitted to him that he did sign the Risley bond. Witnesses testifying to the admissions of parties out of court frequently fail to convey to the jury the exact meaning of what was said. This may result from defective recollection as well as from indifference or inattention to what really was said. But if you believe Nebeker did say to Griggs that he had signed the Risley bond, and that he referred to the bond in suit, then, as to Nebeker, you have an admission that the bond is genuine. I need hardly say that the law regards such evidence as material and convincing. The other testimony of the plaintiff, more or less confirmatory of the main points already alluded to, I will not stop to notice further than to say that you will give it all its due weight. No one has testified that he saw Gish sign the bond, or heard him admit that he had signed it. As to him the plaintiff must rely on the testimony of the witnesses who said they were familiar with his handwriting, and that in their opinion his signature to the bond was genuine, and, in addition thereto, the circumstances and facts which apply with like force to all the defendants.

Passing next to the evidence of the other side, you have the positive testimony of Willson, Nebeker and Gish, that they did not sign the bond. The sureties have long lived in Montgomery and Fountain counties, their callings have been such as to afford ample opportunity for their neighbors to become familiar with their handwriting and signatures.

Many of those neighbors of acknowledged intelligence and integrity, have testified that they were acquainted with their handwriting, and that in their opinion the signatures to the bond were not genuine. While the opinion of witnesses thus given is material and competent evidence for the defendants, and should receive the weight to which it is justly entitled, you will readily perceive why evidence of this character should be received with caution.

On cross-examination the witnesses undertook to point out wherein the signatures in dispute were unlike the genuine signatures of the defendants. It is for you to say whether the supposed variations pointed out by the witnesses were trivial or important. We know that men, even good scribes, do not always sign their names exactly the same way. Dissimilitude may be occasioned by a variety of circumstances, by the state of health and spirits of the writer, by the materials, by his position, and by his hurry or care. And in this connection the question will doubtless occur to you whether the witnesses who testified on this point would have given their opinions that the signatures were bogus, had they not looked at the bond with their minds unconsciously swayed by the impression created by the defense set up by the sureties. The testimony of a witness who speaks from his own personal knowledge is more satisfactory and convincing than the testimony of another who speaks of matters which lie in opinion only.

If a witness swears that he was present and saw a party sign a disputed instrument of writing, his evidence ought to outweigh the statement of another (both witnesses being equally credible) who testifies that he is acquainted with the handwriting of the alleged signer and that he does not believe the signature is genuine. This suggestion applies to the positive testimony of Smith in connection with the evidence of the witnesses who gave their opinion as to the genuineness of the disputed signatures from a knowledge of the handwriting of the three defendants. In weighing the evidence of

Willson, Nebeker and Gish, you will not forget that they are defendants, testifying in their own behalf, with heavy pecuniary interests at stake; which circumstances go to their credit.

All other facts which are relied on by the defendants as tending to support their side of the issue, and to which your attention has been called by counsel, you will give due weight to, without further summing up by the court.

Mrs. Willson, the wife of one of the defendants, was permitted to testify before you as to certain facts in the case. She was not a competent witness for or against her husband, and was permitted to testify, as was stated at the time, only in behalf of the defendants, Nebeker and Gish, and you will consider her evidence only so far as it bears on the case as to them.

With one or two exceptions the witnesses all testified in your presence. The law justly regards cross-examinations as one of the most efficacious tests of the truth. That test has been unsparingly applied in this case, especially to the defendants, Willson, Nebeker and Gish, and to C. W. Smith. The purpose was the better to enable you to see how far, if at all, the witnesses were influenced by their situation, their interests, their bias, their sympathy and friendship, and also to give you an opportunity of judging of the strength and accuracy of their recollections and their knowledge of the facts of which they spoke. You are the exclusive judges of the credibility of the witnesses and of the weight of their testimony.

This trial is important not only in the amount involved, but still more so in the fact that it seriously concerns the characters of men who have testified on both sides, and who have, heretofore, enjoyed the confidence and esteem of the public.

As might be expected in such a case, the zeal and ability displayed by eminent counsel on both sides during the progress of the trial, as well as in the final argument, have not been out of proportion to the responsibility resting upon them.

Having arrived at a conclusion after a patient and intelligent consideration of all the evidence, let there be no hesitation about your verdict.

You have no right to think of consequences. Keep this steadily in view.

The jury disagreed.—[REPORTER.

In re THOMAS C. GURNEY.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1877.

IN BANKRUPTCY.

1. UNRECORDED BILL OF SALE.—Where a bill of sale of personal property is made, and the vendee leases the same to the vendor, with a clause in the contract of lease by which the bankrupt agrees to buy the property back at a fixed price, both bill of sale and lease being unrecorded, the transaction is, in effect, a mortgage.

2. SECRET LIEN.—Such an agreement is a secret lien, and a fraud on the rights of creditors.

3. RIGHTS OF ASSIGNEE.—The adjudication of bankruptcy is equivalent to a judgment and levy, and the assignee has the same right to have such a transaction nullified as a judgment creditor would have.

4. ASSIGNEE REPRESENTS CREDITORS.—An assignee not only represents and stands in place of the bankrupt, but he also represents the creditors. He has a stronger right than the bankrupt. He can contest claims and rights to property which the bankrupt cannot contest.

Ordway & Newland, for petitioner.

John J. Orton, for assignee.

DRUMMOND, J.—This is a controversy concerning the right

of property in an engine, boiler and some fixtures which were in possession of the bankrupt under the following circumstances:

A man by the name of Hanchett appears to have loaned the bankrupt money, taking a bill of sale of the property, and the bankrupt taking back something in the nature of a lease, and agreeing to pay a certain sum for the use of the property; this was a secret arrangement between the bankrupt and Hanchett. There was no change of possession; it remained with the bankrupt, and there was no registry either of the bill of sale or the lease. It was, therefore, a secret lien or claim upon the property in possession of the bankrupt, of which he was the apparent owner, and so unknown to other parties who might deal with him. There is no doubt that this contract was good, as between the bankrupt and Hanchett. There was a clause in the contract of lease, by which the bankrupt agreed to buy the property back at a fixed price. This was, then, in effect a mortgage of the property to secure a loan made by Hanchett to the bankrupt, unrecorded and unknown to his other creditors. This was invalid under the law of Wisconsin as to creditors. If, then, a creditor had attached the property under such circumstances, as the property of the bankrupt, he could undoubtedly have held it. If an execution had issued upon a judgment against the bankrupt, and been levied upon the property as his, it would also have held it.

But it is claimed that when the party became bankrupt, and a deed was made to his assignee, the assignee took no other right of property than he himself possessed; and as it was a good title as between the parties, it would be as against the assignee. In other words, if it be true in law and in fact, that the assignee merely stands in the place of the bankrupt to all intents and purposes, then of course this secret arrangement made between Hanchett and the bankrupt, would be valid. But is it true, that an assignee stands precisely in the

place of the bankrupt as to creditors? It seems clear he does not. He has a stronger right than the bankrupt. He can contest claims and rights to property, which the bankrupt cannot contest. That is the meaning of the statute which declares, that all property disposed of in fraud of creditors, shall pass to the assignee. Now, this was a transfer of property in fraud of the creditors of the bankrupt. The District Court decided (mainly upon the authority, as I understand, of a decision of Mr. Justice HUNT), that an assignee stands simply in the place of the bankrupt; that as the representative of the creditors he had no other right than the bankrupt, and therefore, upon a petition filed by Hanchett, this property was ordered to be delivered to him. If this decision of Mr. Justice HUNT is correct, then the decision of the District Court was right; but I am of the opinion that it is not. It is contrary to the rule which has been always adopted in such cases in this circuit. It has been uniformly held that the assignee occupies a stronger position as the representative of creditors than the bankrupt; that he is the agent of the creditors, for the protection of their rights; that as to the property of the bankrupt, and as to actions against him, there is a suspension of all legal proceedings; that the assignee stands in the place of an attaching or an execution creditor, and that he has all their rights.[1]

Mr. Justice HUNT has asserted in the case referred to, *In re Collins*, 12 Bankruptcy Register, 379, that an assignee cannot impeach the validity of a mortgage which is void as against creditors, on account of the omission to record it, as required by the state laws. The ground upon which he puts it is, that the assignee cannot claim or hold the position of an attaching or an execution creditor; that he does not represent a judgment or execution creditor, and is not like a purchaser or mortgagee holding in good faith. The reason why an assignee stands as an attaching or judgment creditor, is stated

1. *Harvey vs. Crane*, 2 Bissell, 496, and see *Robinson vs. Elliott*, 22 Wallace, 513.

in another case in the same volume, p. 474, *Barker vs. Smith*, as follows:

"Conceding that a general creditor, having no lien or judgment, could not file a bill to set aside, as void, an unrecorded conveyance of real estate, and to subject the property to the payment of his debts, does this rule apply to an assignee in bankruptcy?" * * * "It would appear that an adjudication in bankruptcy removes the necessity for a lien or judgment before a bill can be filed to subject the property fraudulently conveyed, or when the transfer is for other reasons invalid."

It is because all legal proceedings touching the property of the bankrupt, and as to suits against him, are suspended, that the adjudication of bankruptcy has this effect.

"If the rule were otherwise, then no property conveyed by a bankrupt in fraud of his creditors, or by any void or invalid conveyance, unless the creditors had reduced their claims to judgment, could be subjected by the assignee in bankruptcy to the payment of debts."

"For after an adjudication of bankruptcy, no creditor, whose debt is provable, is allowed to prosecute to final judgment, any suit in law or in equity, until the question of the bankrupt's discharge shall be determined."

This reasoning seems to me entirely satisfactory, and while there has been a difference of opinion upon this subject, I think the weight of authority is also in accordance with this last case, although it is the opinion of a circuit judge.

We have the opinion of another judge of the Supreme Court of the United States, Mr. Justice STRONG, adverse to that of Mr. Justice HUNT, in a case very recently decided, and reported in 15 Bankrupt Register, *Miller vs. Jones*, p. 159. That was a case where it was held that if it were treated as an unrecorded mortgage of the property, it was valid, on the ground of possession in the mortgagee before the proceedings in bankruptcy were instituted. In the case at bar there was no change of possession. The bankrupt remained in posses-

sion of the property up to the time of the proceedings in bankruptcy.

"No one doubts," says Mr. Justice STRONG, "that in this case Kaufmann & Hawk might have actually delivered the chattels to Jones as a security for the debt due him." If in this case we are now considering, the bankrupt had delivered the property to Hanchett instead of retaining it himself, it would have occupied an entirely different position. Mr. Justice STRONG continues, "And had they done so, the pledge would have been good, even as against creditors. Until the delivery, creditors having recovered a judgment, might have levied upon the goods, and held them by right superior to that of a pledgee or mortgagee without possession, except so far as he might have been protected by the statute. And I think, notwithstanding some decisions to the contrary, an assignee in bankruptcy of the mortgagors stands in the position of such creditors with equal rights (that is, judgment creditors), the adjudication of bankruptcy being equivalent to the recovery of a judgment and a levy."

Now, in view of this difference of opinion between two judges of the Supreme Court, and what I understand to be the general rule adopted by the district and circuit judges, and also in view of the one always adopted in this circuit, I must hold that this secret lien or mortgage, as against the creditors, represented by the assignee, was invalid and inoperative, and that Hanchett, the mortgagee, or vendee (whichever we may call him), had no right, upon a petition to the District Court, to have this property surrendered to him, but that it belongs to the general creditors of the bankrupt.

Therefore, I shall reverse the order of the District Court. Of course, if Hanchett shall be advised that he has a valid claim to the property, he can have his rights litigated in a proper adversary proceeding against the assignee.

As to status of assignee in bankruptcy, see also *Cady, assignee, &c., vs. Whaling et al.*, post p. 430.—[REPORTER.

MATHIAS MOHR *et al.* vs. ANNA MANIERRE.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1877.

1. SALE OF LUNATICS' ESTATE.—In Wisconsin, where a proper case is made in a petition to the County Court, for a license to sell the estate of a lunatic, the power of the court is set in motion and it has jurisdiction of the case; and the fact that the court had decided erroneously as to notice, etc., cannot collaterally affect the rights of a *bona fide* purchaser under the sale decreed by the court.

2. CONFLICT OF LAWS.—As to general principles of law the Federal Court has the right to follow its own views, and is not bound by the decisions of the state courts.

3. JURISDICTION OF COURT OF LIMITED AUTHORITY.—Where the jurisdiction of a court of special authority appears upon the record, its action and decision can no more be collaterally inquired into than can the action and decision of a court that has authority over all questions and controversies.

Ejectment for the recovery of about thirteen acres of land on the borders of Lake Geneva, in Walworth county. The land belonged to Mathias Mohr, against whom a commission of lunacy was obtained, and a guardian having been appointed under the laws of this state, application was made to the County Court of Walworth county, for the sale of the land, for the support of the lunatic or to pay his debts.

A sale was accordingly made of this and other tracts of land, and the defendant claims under the sale.

The plaintiff Mohr, having recovered his reason, and the commission of lunacy being revoked, and he having in the meantime transferred an undivided interest in the property to Mr. Cotzhausen, brought this action of ejectment, on the assumption that the proceedings in the County Court of Walworth county, which resulted in a sale of the land, were illegal, and that no title passed.

Cotzhausen, Sylvester & Scheiber, for plaintiffs.

S. U. Pinney, for defendant.

DRUMMOND, J.—Of course the question turns upon the validity of the sale made by the guardian of the lunatic. If that were invalid, then the plaintiffs are entitled to recover.

The petition which asked for the action of the court, was not strictly in compliance with the statute, the allegations not being so full as the statute seemed to require; and perhaps there might be some doubt, if it were a new question, whether or not the allegations of the petition were sufficient. But the decisions, both state and federal, seem to agree that a petition such as was filed in this case was sufficient to set the court in action; in other words, to show that the court was called upon to proceed in the way pointed out in the statute to obtain the necessary means from the sale of the land for the payment of debts or the support of the lunatic. And as to this very petition, in a case that went up to the Supreme Court of the state upon a sale of a portion of the property which took place at the same time as that under which the defendant claims, that court says: "The petition may be defective in some particulars, but it is sufficient in substance to call into exercise the power of the court."[1] It was, therefore, so far as the petition is concerned, sufficient to give jurisdiction to the court. This is the effect, also, of the decisions of the Supreme Court of the United States, in two cases that went up from this state.[2] And although they were cases decided under the territorial laws, the principles involved were substantially the same. And in those cases, the Supreme Court of the United States held, that it was the petition that gave jurisdiction to the court, and set its machinery in motion, and that, if upon the face of the petition

1 *Mohr vs. Tulip*, 40 Wisconsin, 76.

2 *Grignon's Lessee vs. Astor*, 2 Howard, 319; and *Comstock vs. Crawford*, 3 Wallace, 396.

it appears that the objects which the law had in view in such cases were clearly set forth, that was sufficient. So there is a concurrence of opinion both in the federal and in the state courts that the petition was sufficient. The law of Wisconsin applies substantially the same conditions to the sale of the real estate of lunatics, as to decedents.

We come to another question, where there is a difference of opinion between the federal and state courts, upon this point; the statute required a certain notice to be given of the time and place for hearing the petition, and it seems the requisite notice was not given. The State Court holds that was in the nature of process to bring the parties before the court, and was jurisdictional; that unless the notice which was required by the statute was given, the court had no jurisdiction to act, and therefore, all proceedings before it were void. The Supreme Court of the United States takes a different view, and holds in the cases referred to, that the proceeding to sell real estate in such circumstances, is one *in rem* and that there are no adversary parties. The manner in which the precedent was established in this state, as I understand, was this: A case was decided by a circuit judge, (it being understood that the case would go to the Supreme Court of the state,) in a somewhat informal manner. A similar point in principle arose in that case, and it was held that the adjudication of the Probate Court did not foreclose the party in a collateral proceeding.

That case went to the Supreme Court of this state. *Sitzman vs. Pacquette*, 13 Wisconsin, 292.

The circuit judge, having in the meantime become one of the judges of the Supreme Court, did not sit in the case, and it was submitted to two judges. The judges differed in opinion on the case, and so the judgment of the court below stood affirmed; and this has been the foundation of a rule, which we must consider as established in the Supreme Court of the state, that it is a question of jurisdiction—namely: whether proper notice had been given for the hearing; because, in

accordance with the principle decided in the first case, they have proceeded in other cases referred to in *Mohr vs. Tulip*, 40 Wisconsin, 66; in the last case though, *Salter vs. Hilgen*, 40 Wisconsin, 363, the court cites with approval, the language of DIXON, C. J., in *Tallman vs. McCarty*, 11 Wisconsin, 401, as follows: "No order which a court is empowered, under any circumstances, in the course of a proceeding over which it has jurisdiction to make, can be treated as a nullity, merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. The only question in such a case is, had the court or tribunal the power, under any circumstances, to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose. In the case before us, it was for the Circuit Court to determine, in the first instance, when and how the authority, with which it was invested to direct a sale, should be exercised; and if, in so doing, it committed an error, no matter how egregious, whether in the construction of the statute, or otherwise, still the order was valid until reversed on appeal. It was a mere error or irregularity which could only be taken advantage of by appeal, but cannot be inquired into in this proceeding."

This is in harmony with the ruling of the Supreme Court of the United States in the two cases referred to. In the original case of *Sitzman vs. Pacquette*, *supra*, where an opinion was given by Judge PAINE, that the decision of the court below was correct, he seemed disinclined to follow the rule of the Supreme Court of the United States in *Grignon's Lessee vs. Astor*, *supra*, and held it should not apply to that case. Judge COLE gave an opinion to the effect that the decision in *Grignon's Lessee vs. Astor*, ought to rule that case. It is difficult to understand that there is any difference in principle to affect the validity of the sale in the two cases.

I think that the doctrine established in the case of *Grig-*

non's Lessee vs. Astor, followed by the decision of the case of *Comstock vs. Crawford*, is founded upon the clearest principles of justice and of equity. It is this: That when, in a case like this, a court has jurisdiction by the filing of a proper statement of a case before it, to proceed and adjudicate upon the case, and has so done, that wherever a decree or judgment there entered comes up collaterally, the decision of the court is conclusive upon the rights of parties. In other words, where it is a question, whether or not there was proper notice in conformity with the law, and the court has decided that there was, and has adjudicated upon that assumption, or upon the sufficiency of any proof on which it acted in the case; collaterally, the decision of the court must be considered as conclusive. So that when a man seeks to purchase real property, and the title depends upon the adjudication of a court of competent jurisdiction, he need not look further than the decree and the sale under it; he is not bound to follow every step which may have occurred in the course of the proceeding to see whether this or that fact exists, or this or that technicality has been complied with.

The only question is, had the court jurisdiction of the case? This was the rule laid down in *Grignon's Lessee vs. Astor.* It is founded, as I think, upon the plainest principles of right. This was followed in the case of *Comstock vs. Crawford*, although the decisions of the Supreme Court of this state, which laid down a different rule, were there cited by counsel, and it cannot be doubted that the Supreme Court of the United States dissented from the opinion of Judge PAINE in *Sitzman vs. Pacquette.* See 3 Wallace, 403, 404.

Now if the question is, whether or not a court has jurisdiction of a case, must we follow the decisions of the Supreme Court of this state, when those decisions are contrary to the decisions of the Supreme Court of the United States? For instance, the Supreme Court of this state has said that whether or not due notice was given, was a question of jurisdiction. The Supreme Court of the United States has said

that it is not a question of jurisdiction, and has clearly stated in *Grignon's Lessee vs. Astor*, what constitutes jurisdiction in a court. I think we must follow the rule laid down by the Supreme Court of the United States, and especially when that court has had before it a case, going up from this state, where these decisions were cited and considered. Although one was under the territorial law and the other under the state law, the principles involved in the cases were precisely the same, and if these cases were decided rightly in the Supreme Court of the state, and the federal courts were bound by them, then the Supreme Court of the United States ought not to have decided *Comstock vs. Crawford* as it did.

I am fully aware of the very serious consequences growing out of a difference between the federal and state courts, and especially in deciding any question affecting the right to real estate. The rule would be undoubtedly different in the State Court, from that which we lay down here, following the decision of the Supreme Court of the United States. But if we examine *Grignon's Lessee vs. Astor*, and *Comstock vs. Crawford*, it will be found that this court cannot hold this sale invalid without reversing the opinion of the Supreme Court in each of these cases, and saying that as the Supreme Court of this state has decided differently, we must followthe decision.

I admit it seems rather difficult to lay down any absolute rule as to where the highest court of the state is to be our guide, but this, I think, has been established by the Supreme Court of the United States, that as to a general principle of law, the Federal Court has the right to follow its own views of the law and is not bound by the decision of the State Court. Now what shall constitute jurisdiction in a court is a general principle of law, and, as I understand, the Supreme Court of the United States would hold in this case that the County Court of Walworth county had jurisdiction of the case. It makes no difference that the County Court of Walworth county was a court of a particular jurisdiction, that is, jurisdiction over particular subjects.

Its action and its decision, within its province, were just as binding as though it had general jurisdiction over all subjects and controversies. This is a universal rule.

Those courts whose decisions were considered in the two cases referred to, were courts of a particular jurisdiction, and yet the Supreme Court of the United States held they were conclusive.

On these principles, therefore, the judgment of the court will have to be in favor of the defendant in this case, on the ground that a judgment of the County Court of Walworth county having ordered a sale of the property of a lunatic, and the presumption being that all the requisites of the law had been complied with as found by that court; that the sale was made, and reported to the court and confirmed, we must hold the title under the sale to be valid. And it will be recollected that the defect here is not one included in section 62 of chapter 94 of the Revised Statutes of Wisconsin, or section 23 of chapter 93 (if that applies), 2 Taylor, 1178 and 1193, provided we are correct that the court had jurisdiction. The license to sell was given. A bond was duly approved. The oath was taken. Notice of the time and place of sale was given as prescribed. The property was sold, and the sale confirmed by the court to a person who purchased in good faith.

It is not material, as I understand, that a portion of the property was the homestead; this property was no part of the homestead, and because it may be that a portion of the property sold, ought not to have been sold, it would have no effect upon this particular part of the property. Neither is there any evidence on the face of the record of the case in the County Court, from which fraud is established, so as to connect the purchaser with it and thereby prevent him from being a purchaser in good faith.

For cases in which the federal courts are not bound by the constructions or decisions of the highest state tribunals, consult *Bradley vs. Sill*, Vol. 4 of this Series, 473; *Ex parte Robinson*, 2 do., 309; *Schenck vs. Supervisors of Marshall County*, do., 533.—[REPORTER.

In re PIERCE AND WHALING.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1877.

IN BANKRUPTCY.

1. GIFT OF PERSONAL PROPERTY BY INSOLVENT HUSBAND TO WIFE.—Without any visible change of possession, does not constitute an adverse interest in the wife so as to compel the institution of separate proceedings for the purpose of litigating the rights of the parties.

2. SUMMARY JURISDICTION OF BANKRUPTCY COURT.—On a petition by the assignee of the husband for the possession of the property, an affidavit by the husband, that the property is in possession of his wife is not a sufficient answer; and the bankruptcy court can compel the property to be turned over to the assignee.

3. PRACTICE.—Upon such a petition by the assignee, the court should require the bankrupt to answer.

This was a petition by the assignee of the District Court for the possession of personal property which it was alleged was in the hands of the bankrupt. The petition remained unanswered except by the affidavit referred to in the opinion.

D. S. Ordway, for assignee.

James G. Jenkins, for bankrupts.

DRUMMOND, J.—The facts set forth in the petition to the District Court were substantially these:

That the bankrupts, some time ago, had entered into business with a very small capital; that they became indebted for large quantities of goods purchased; that the indebtedness continued and increased; that they were actually insolvent, the insolvency growing greater in amount all the time; that they did a very large business, incurred enormous debts, par-

ticularly to one firm, who had advanced them large sums of money from time to time, the indebtedness being between $300,000 and $400,000; that they lived in an expensive manner; had extravagant furniture considering their actual pecuniary condition when they commenced the business, and at periods afterward. Articles of luxury and expensive furniture were purchased by Mr. Pierce and placed in his house; and the statement is in the petition, which we have to take as true, that he gave those things (after he had purchased them, being then insolvent, and using other people's money, the product of the goods which may be said to have belonged to others) to his wife, saying, "I give these to you."

He remained in the house; he had bought the property; there was no separation between man and wife, no severance of posession; they were both living in the house, and he having made use of the few simple words as above, it is claimed that his wife now owns this property, or that she has an adverse interest in it, and therefore that there must be a bill in chancery or a suit at law to determine the rights of the wife: [1]

Now, if it had been an article of apparel, or simply the wardrobe of the wife, or jewels, or any expensive personal articles which in a sense might be said to be appropriated to the use of the wife, it possibly might be different. But here was property in common between the husband and wife, of which there could not be a distinct, separate appropriation to the wife, unless the mere use of the words, "I give this to you," shall constitute a separate and distinct property, shall sever the possession, and from thenceforth the property shall be considered as the separate and independent property of the wife.

Can we tolerate such things as this? Can it be true that an insolvent merchant can fill his house with all sorts of

1. *Smith vs. Mason*, 14 Wallace, 419; *Marshall vs. Knox*, 16 Wallace, 551.

extravagant furniture, and then say to his wife, "I give it to you," they remaining in the house and living together, and then compel the creditors, or assignee representing the creditors, to solemnly go through with what I cannot help calling the farce of filing a bill in chancery to deprive the wife of such a right as this?

I admit that wherever there appears to be an adverse interest in any one who is not before the court, the bankrupt court cannot adjudicate on the same without that person being properly before it, without setting in motion the machinery of a court for the purpose of litigating any supposed rights. But this is not an adverse interest. Does the mere fact that the husband says to the wife, "This property which I have bought and placed in my house is yours," constitute an adverse interest in the wife? I know of no law that leads to such a conclusion. There is not even an equity in the wife under such circumstances. The right of property and the possession of the property are absolutely unchanged. The statute of this state declares, I admit, as the statutes of most of the states now declare, that the wife can receive and hold as her own independent property that which she obtains from a source other than that of her husband. But it does not change the rule of law that unless it does not come from another source it still is the property of the husband.

In this case the petition alleges that the wife had no property, never has had any except her wardrobe and the usual presents made on a wedding day. It therefore rebuts the idea that any of this property whatever was purchased with the money of the wife. It was all purchased with the money of the husband, or rather the money of his creditors.

And then, again, a portion of this property was not even given by the husband to the wife. It was put upon premises, the title to which was apparently in the wife, and it is claimed to belong to the wife, because the husband bought the furniture or other articles of personal property, and put them upon the premises which the wife seemed to own. So that, when-

ever personal property is put by the owner upon real property owned by another, it transfers, under this view, the personal property to the owner of the real property. That certainly is a new doctrine in the law.

There is an affidavit put in, in answer to the petition to the District Court, in which the husband alleges that he cannot deliver this property to the assignee because it is in the possession of his wife. Now, if he had shown in this affidavit that there was any possession in his wife, different from his own possession, there might be something in it. But he must rebut the presumption which arises from all the facts in the case, for they are both occupying, as man and wife, jointly, a house in which this furniture is placed. It is a necessary inference, as they are thus living together, that whatever possession the wife has, she has simply because she is living with her husband in the same house, and that he has said to her, "This property is yours."

The District Court thought that there was in this case an adverse interest in the wife, and therefore, under some of the decisions of the Supreme Court, her right must be litigated in an independent action.

Now, if there did really appear to be an adverse right, I admit the binding authority of these decisions. But for the reasons I have already stated, it is most manifest that there is no adverse right in the wife. I know of no law or equity that, under these facts, gives her the slightest adverse right to the property. There certainly has not been any cited in this case. I think, therefore, that the bankrupt must meet the case made by the assignee in some other way than by such an affidavit as this, before the District Court could of right hold that this woman can retain the property. I must say I have very little patience with transactions of this kind. If courts of justice are made to accomplish any object, it certainly is one of the very highest to protect, in the speediest possible way, the right of creditors attacked, as this case shows they have been here, and to sweep away, as a mere cobweb, such a

transparent fraud as is shown in this case.

Therefore I shall remit the case to the District Court, with instructions to that court to require the bankrupt to answer the petition, and then, when he has so answered, if it shall appear that there is really any adverse interest in the wife, then, of course, she will be permitted to have her right ascertained in an independent proceeding.

AUGUSTUS F. CADY, Assignee, Etc., vs. JAMES M. WHALING *et al.*

Circuit Court.—Eastern District of Wisconsin.—May, 1877.

In Equity.

1. Suit by Assignee.—An assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the bankrupt act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations.

2. Fraud.—Jurisdiction of Court of Equity.—Courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter.

3. An assignee in bankruptcy stands in the position of judgment creditor and can bring a suit in equity to set aside a fraudulent conveyance.

David S. Ordway, for complainant.

James G. Jenkins, for defendants.

Cady *vs.* Whaling.

This was a bill in equity, to part of which each of the defendants demurred. The bill was filed by the assignee in bankruptcy of the estate of Charles L. Peirce and James M. Whaling, bankrupts, and charged in brief that in November, 1867, the bankrupts commenced business in Milwaukee, as partners under the firm name of Peirce & Whaling, with a nominal capital of $5,000.

That at the time of commencing business, neither of the partners had any other property, exclusive of what was put into the business, except such as was by law exempt from seizure for debts.

That immediately after November, 1868, they extended their business largely, buying upon credit, and by July, 1869, were in possession of a stock of merchandise of the value of one hundred thousand dollars.

That notwithstanding the amount of goods bought and sold by them, said Peirce & Whaling were on the first of January, 1870, insolvent, which fact of insolvency appeared on their books of account, and was known to both of the bankrupts, but was not known to their creditors.

That the firm and the individual members thereof, were largely insolvent, constantly from the first of January, 1870, until the date of the filing of a petition in bankruptcy against them, on the 6th of July, 1876.

The extent of this alleged insolvency, from year to year, was stated in detail in the bill, which alleged that when the petition in bankruptcy was filed, they were owing, over and above the value of their assets, more than $300,000.

Alleged fraudulent acts on the part of the defendant, James M. Whaling, relating to the merchandise account of the firm, and also relating to an inventory of the goods of the firm, made August 1st, 1875, were set forth in the bill.

It was also alleged that on the 1st of January, 1870, the bankrupts were indebted to Jones & Laughlins of Pittsburgh, Penn., in a large amount, for merchandise purchased and for moneys loaned; that the moneys so loaned and advanced were

entered upon the partnership books of Peirce & Whaling by the name of "accommodation account;" that this accommodation account was opened March 13th, 1869, and that from that time forward, Jones & Laughlins continued to advance moneys to the bankrupts, for the purpose of carrying on said business, until the 1st of January, 1876, when the bankrupts were indebted to the Pittsburgh firm, upon the accommodation account, in the sum of $99,177.57.

The indebtedness of Peirce & Whaling to Jones & Laughlins, from year to year, beginning January 1st, 1871, was set forth in items in the bill.

The bill further alleged, that the defendants, James M. and Ella M. Whaling, intermarried about December 15th, 1869, and that at the time of her marriage, she, the said Ella M. Whaling, had no separate estate aside from her wardrobe and bridal presents, and that she had not received since her marriage any separate estate from any person, except her husband, other than such articles as had been presented to her upon anniversary occasions or holidays.

That during the time Peirce & Whaling were in business, the defendant, James M. Whaling, drew out of the firm and from its assets, the sum of $154,000, and appropriated the same to his own use.

That with moneys drawn from the firm while it, and each member thereof, was insolvent, the defendant, James M. Whaling, purchased the real and personal property described in the bill, taking title to all of the real estate so purchased, in the name of his wife, the defendant, Ella M. Whaling, and for the purpose, and with the intent to hinder, delay and defraud his creditors, then existing, and in fraud of the rights of his creditors, then and now existing, and the rights of complainant as assignee in bankruptcy, and without any consideration paid therefor by said Ella M. Whaling.

That the personal property was purchased and paid for during the years 1870, '71, '72, '73, '74, '75 and '76, and

while the defendant, James M. Whaling, was absolutely insolvent, and owing Jones & Laughlins over $100,000.

That after the purchase of this property, the defendant, James M. Whaling, made a voluntary gift of the whole thereof, by word merely, to his wife, the defendant, Ella M. Whaling, who now claims that she is the owner thereof, and in the lawful possession of the same.

The personal property referred to, was alleged to consist of valuable household furniture, ornaments, etc., and stated in the bill to be of the value of about $10,000, and was alleged to be not exempt from execution or seizure for the payment of debts.

The bill also charged that the defendant, James M. Whaling, while a member of the firm of Peirce & Whaling, and while he and said firm were insolvent, procured a large amount of insurance upon his life, payable in case of his death, to his wife, Ella M. Whaling. That he paid all of the premiums therefor, from the time of so taking the same, until the time of the filing of the petition in bankruptcy, out of the moneys and property of Peirce & Whaling, that the amount of such life insurance was and is about $40,000.

That the said Ella M. Whaling never paid of her own money or property, anything upon such life policies, but that the same were so taken by said Whaling, payable to his wife, in fraud of the rights of his creditors, and of complainant's rights as assignee; the said James M. Whaling thereby intending to make a provision for his wife out of the assets of the firm of Peirce & Whaling, and to defraud his creditors, then and now existing.

These policies of insurance were set forth in detail in the bill.

The prayer of the bill was: that the said Ella M. Whaling might be required forthwith to surrender the possession of all of the property, real and personal, described in the bill, to complainant, pending this suit, or that a receiver of said

property may be appointed by the court, to whom said property shall be transferred and delivered; that the defendants might be enjoined from in any manner interfering with, incumbering or disposing of the property; that the conveyance of all of the real estate to Ella M. Whaling, might be adjudged fraudulent and void, and to be held in trust for the creditors of Peirce & Whaling, and of the defendant, James M. Whaling, and that a decree might be entered for the conveyance and release of such real estate to complainant; that all gifts and voluntary conveyance of the personal property mentioned in the bill, to said Ella M. Whaling, might be decreed to be fraudulent and void, as against the creditors of James M. Whaling, and as against complainant as assignee in bankruptcy; and that said Ella M. Whaling be required to deliver the said personal property to complainant, and to assign all of said life policies to complainant as such assignee.

To so much of the bill as related to the personal property therein mentioned, and as sought to avoid the claims of the defendant, Ella M. Whaling, thereto, both of the defendants demurred.

Dyer, J.—It is alleged in support of the demurrer: *First*, that an assignee in bankruptcy cannot maintain an action to set aside or avoid a transfer of property made by the bankrupt prior to the time limited by the Bankrupt Law itself; in other words, that to enable an assignee to avoid a transfer or conveyance of property made by the bankrupt in fraud of creditors, it must be alleged and shown, that such transfer or conveyance was made within the period prescribed by section 5129, Revised Statutes; and that if such transfer or conveyance is made more than six months before the filing of the petition in bankruptcy, the assignee is without authority or right to maintain an action in behalf of creditors, to set aside such transfer and to recover the property.

It is true, that by the section of the statutes referred to, it is provided, that if an insolvent person, within six months before the filing of a petition in bankruptcy against him,

makes any transfer or disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, and that such transfer or conveyance is made with a view to prevent the property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defeat the object of, or in any way impair, impede or delay the operation and effect of the act, then the transfer or conveyances shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt. But it does not follow that the assignee in bankruptcy can only avoid such a fraudulent transfer of property made by the bankrupt, as comes within the purview of this section. This section deals only with frauds on the act itself, and by reference to section 5046, it is found, that property conveyed by the bankrupt in fraud of his creditors, is, in virtue of the adjudication of bankruptcy, and the appointment of an assignee, vested in such assignee, subject only to the exceptions stated in section 5045, which relate to property exempt from seizure for the payment of debts.

The point under consideration has been so fully settled, that without further discussion, I regard it only necessary to refer to two or three cases in which the question has been passed upon, In *Pratt vs. Curtis et al.*, 6 Bankruptcy Register, 139, it was held that land conveyed in fraud of creditors passed to the assignee in bankruptcy of the grantor, by virtue of section 14 of the Bankrupt Act (now section 5046, Revised Statutes), though conveyed more than six months before the bankruptcy, and was therefore, not a transfer within section 35 of that act, (now section 5129, Revised Statutes.)

In *Carr vs. Hilton*, 1 Curtis C. C., 233, it was held under the Bankrupt Act of 1841, that an assignee could maintain a bill to avoid and set aside a fraudulent conveyance of lands by the bankrupt to a third person, although such conveyance was made before the passage of the Bankrupt Act.

This question has also been considered and passed upon in this circuit, in case of *Bradshaw, assignee, vs. Klein*, 2 Bissell, 20. In his opinion in that case, Judge McDonald says: "Counsel for the defendant insist that the 35th "section of the Act modifies the language of the 14th section, "and limits the right of action to set aside fraudulent con- "veyances, to four, or at most, six months; but I cannot "assent to this construction. I think the provision above "cited from the 14th section refers to the state statutes against "fraudulent conveyances, and to this only; and that the 35th "section of the Bankrupt Act has no reference to those "statutes, but is only intended to reach frauds on the Bank- "rupt Act. The two sections relate to different subjects, "neither of them therefore, can be construed as explaining, "modifying or limiting the operation of the other." And the conclusion is, that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the Bankrupt Act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations.

Other authorities of the same purport might be cited, but these are sufficient.

The second point urged in support of the demurrer is, that as to the personal property mentioned in the bill, the complainant has ample remedy at law; that no discovery is needed, and therefore, that the complainant cannot, as to such personal property, come into equity.

It is to be borne in mind that the claim on the part of the complainant is, that the defendant, James M. Whaling, in fraud of his creditors, appropriated moneys, belonging in equity to the creditors of Peirce & Whaling, and part of the assets of that firm, and with such moneys purchased

the property in question, and undertook, while in a condition of insolvency, to transfer the property to, and vest the title thereof, in his wife.

Here upon complainant's claim is involved the avoidance of a voidable legal title vested in the wife, and the case seems to be one of a class in which the rule frequently asserted has been applied,—that courts of equity possess a general concurrent jurisdiction with courts of law, in cases of fraud cognizable in the latter. This is decided in the case of *Spalding, assignee, vs. McGovern et al.*, 10 Bankruptcy Register, 188. In that case the court said: "Although the "complainant claims title under proceedings in bankruptcy, "the cause of action is not created by the Bankrupt Act: It "is in the nature of a creditor's bill to reach assets placed by the "debtor in the hands of third parties, in order to hinder, delay "and defraud the creditors. An equitable jurisdiction exists "in the court over the case, wholly independant of the bankrupt law."

In the case just cited, a bill in equity was filed to collect certain moneys and property, alleged to have been fraudulently paid and transferred by the bankrupt to his wife, after his insolvency, and also to set aside a conveyance of real estate made through the medium of one of the defendants, to hinder, delay and defraud the creditors of the bankrupt; and the bill was entertained, a demurrer thereto being overruled.

In *Traders Bank vs. Campbell*, 14 Wallace, 87, a suit in equity by the assignee, to recover the proceeds of goods sold under judgment in a state court against the bankrupt, taken by confession, where both parties knew of the insolvency, was maintained, notwithstanding the proceeds were money in the possession of the bank, and a suit at law would seem to have been an adequate remedy.

The precise point under consideration was presented in the case of *Flanders vs. Abbey*, 6 Bissell, 16, a case which arose and was decided in this district. In that case there was a demurrer to a bill, one of the causes of demurrer assigned

being that the complainant had complete remedy at law, and the demurrer was overruled.

My conclusion is, that the second ground urged in support of the demurrer in the case at bar, is untenable.

The third and last point insisted upon by counsel for the defendants, and to be considered is, whether the complainant as assignee, can maintain this bill for and on behalf of general creditors, who have no specific lien by judgment, levy or otherwise, upon the property in question.

In support of the demurrer upon this point, it is urged, that the assignee in bankruptcy took no other rights of property than the bankrupt himself possessed, and that he cannot pursue, for the benefit of general creditors, property that may have been fraudulently conveyed by the bankrupt; that is, that as between the parties, the title to the property given, transferred or conveyed, is good as against the assignee and cannot be impeached in behalf of general creditors.

Support for this position is found in *In re Collins*, 12 Bankruptcy Register, 379, decided by Justice HUNT, and that case is relied upon by counsel for the defendants. In his opinion in the case, Justice HUNT holds, that "in a case of a fraudu-"lent incumbrance upon personal property, a general debt "will not authorize a proceeding to vacate it. There must "be a bill of sale, or mortgage, or execution, or a judgment "levy, or its equivalent, constituting a lien upon the specific "chattel. The cases are all based upon the theory, that the "party attacking the fraudulent act, must have an interest in, "or a lien upon the specific property thus incumbered. This "is an indispensable requisite; the assignee gains no addi-"tional rights over those possessed by the bankrupt, by a "conveyance from him, or by his authority. The bankrupt "can transfer no lien upon this specific property, because he "possesses none; the creditors can give to the assignee no "such lien, for the same reason."

This case is certainly strong authority to sustain the position taken by the learned counsel for the defendants, upon

this demurrer, but I do not feel at liberty to follow it as an authority, in view of the fact that it has been virtually dissented from by Mr. Justice STRONG, in *Miller, assignee, vs. Jones*, 15 Bankruptcy Register, 150, and its soundness expressly denied by the circuit judge of this circuit, in an opinion delivered by him at the present term, *In re Thomas C. Gurney, ante*, 414. In the case of *Miller vs. Jones, supra*, it was held that an assignee has the rights of a judgment creditor, as against a chattel mortgage not properly recorded. In his opinion, Justice STRONG says, that "notwithstanding "some decisions to the contrary, an assignee in bankruptcy "of mortgagors stands in the position of such creditors, with "equal rights; the adjudication of bankruptcy being equiva- "lent to the recovery of a judgment and a levy."

In his opinion *In re Gurney, supra*, Judge DRUMMOND holds, that an assignee does not, as to creditors, stand precisely in the place of the bankrupt; that he can contest rights to property which the bankrupt cannot contest, and he says that in this circuit it has been uniformly held that the assignee occupies a stronger position as the representative of creditors, than the bankrupt. "That he is the agent of the creditors "for the protection of their rights; that the assignee stands "in the place of an attaching or execution creditor, and that he has all their rights."

In *Bradshaw, assignee, vs. Klein, supra*, it was argued that the assignee took such right of action only, as the debtor had before he was adjudged a bankrupt, and that as he could not have sued before the adjudication to recover property conveyed by him in fraud of his creditors, so his assignee cannot afterwards maintain such action; but it was held, that although the transfer of property, made with intent to defraud creditors in that case, was valid as between the parties to it, nevertheless, the assignee, representing the rights of creditors, could maintain an action to have the alleged fraudulent conveyance set aside, and the property subjected to the payment of debts due to creditors, who by

virtue of the Bankrupt Act, were represented by the assignee.

In view of the rulings of the courts upon this question, which I have cited, and especially in view of such as have been recently made, I must hold the third ground upon which this demurrer is urged, as equally untenable with those before considered.

Demurrer overruled, with leave to the defendants to answer that portion of the bill demurred to within thirty days.

See preceding case, p. 426, as to status of assignee.—[*Reporter.*

UNITED STATES vs. ALVIN N. LANCASTER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY, 1877.

1. INSANITY.—Upon an inquisition of insanity upon a motion for a new trial after verdict of guilty of perjury, the question is the same as if raised when the prisoner was called to plead.

2. Upon such an inquisition the question to be decided is, whether the defendant was incapable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it.

3. BURDEN OF PROOF.—The burden of proof of insanity is upon the defendant, yet he should have the benefit of any reasonable doubt.

4. PRACTICE.—In an inquisition of insanity the counsel for the prisoner should open and close the case to the jury.

Mark Bangs, U. S. Attorney, for the United States.

Leonard Swett, for defendant.

BLODGETT, J.—Charged the jury as follows: On the 14th of February last, Alvin N. Lancaster was put upon his trial in

this court, on an indictment for the crime of perjury. The trial resulted in a verdict of guilty, and a motion was made for a new trial. One of the grounds of this motion was based upon the suggestion that at the time of his trial the defendant was of unsound mind, and therefore unable to properly plead to the charge or conduct his defense. This suggestion was sustained by such affidavits and other proofs as, in my estimation, made it necessary to the ends of justice that the fact should be investigated by a jury. And you have been impaneled to inquire into and pass upon the question.

There is no controverted question of law in the case, and the inquiry involves only a question of fact, of which you are the proper and sole judges. The question is, was the prisoner, at the time of his trial, so far of unsound mind as to be incapable of comprehending the nature of the charge against him, and of properly presenting his defense? The testimony is material to be considered only so far as it tends to throw light on this question, and naturally divides itself into two classes:

1. The testimony of witnesses who have known the prisoner for a longer or shorter time, and have detailed facts in regard to his history, his business enterprises, and his domestic and financial troubles.

2. The testimony of professional men who have given special attention to the investigation of mental and nervous diseases, and who, by reason of their skill and attainments are deemed in law qualified to give an opinion as experts, or persons of skill upon the question before you.

You have heard from the various witnesses who have known the defendant, some of them for many years, many facts in regard to his previous life; his business, his temperament, and various vicissitudes and incidents in his career; his successes and failures, and the alleged changes which, it is claimed, have taken place in him, and from which you are asked to infer that he has become insane.

There are no special contradictions or discrepancies in this

testimony. The witnesses who have been called on both sides agree in many of the substantial matters of fact.

It may be considered as conceded that defendant now is about 50 years of age; that for many years previous to 1873 he had been an extensive and successful operator in real estate, and had accumulated a large amount of property, his property being estimated as worth, in 1873, over and above incumbrances, from $150,000 to $250,000; that he possessed unusual capacity as a business man—was prompt and rapid in his conduct of negotiations and business affairs, and always exhibited a quick and irascible temper and a somewhat imperious, jealous and exacting disposition; that in 1869 he lost his wife, and in 1870 his children died, and he showed immediately after this bereavement great grief, and had a very demonstrative way of displaying it.

Sometime in the summer of 1873, a Miss Warren, of New York city, brought some suits against him, for the collection of about $12,000, which she claimed he owed her. He resisted this claim, and insisted that it was prosecuted for purposes of blackmail, and charged all persons who took part in its prosecution as conspiring against him. And it seems to have become an almost fixed habit to indulge in violent denunciations of, and threats toward, all who had any part in the prosecution of these suits.

His property has melted away, and he is now impoverished, and instead of being wealthy, is really a poor man. These facts are admitted, or at least not disputed.

Other facts which may be said to be proved but are not admitted: That his mind is engrossed in trifles; he has become indifferent to business; has acted in a strange and unusual manner; become eccentric in his conduct; and although indicted for a grave crime, did not appear to realize his danger, and made no preparation for his defense, although often urged to do so by his friends. Eminent medical men, from examinations and from knowledge of the man, give an opinion, as a matter of skill, that he is insane.

From all this group of facts, you are asked to deduce the conclusion, that the prisoner was, at the time of trial, insane, the theory being, that the proof shows that since the death of his children, his mind has been giving way, until he is now and was at the time of his trial, actually insane, or so far in the incipient stages of insanity as to render him incapable of properly appreciating and meeting the peril in which he was placed.

On the part of the Government it is contended, and supported by the evidence of eminent medical men, that while they do not deny many of the facts testified to, they deny that they necessarily or fairly establish the allegation of insanity, but insist that all the incidents and facts stated in the testimony, only show him to be a man of violent passions, who has given way in latter years to a sort of ungovernable rage toward those who were endeavoring to enforce the collection of a valid debt from him; that he was always quick tempered and jealous, and has only exhibited to an aggravated degree his natural character toward those whom he disliked, and is simulating or putting on the appearance of insanity to avoid sentence.

The real question, as I have before said, is, whether the evidence satisfies you that this man's mind had so far broken down and lost its texture that he was at the time of his trial incapable of comprehending the dangerous predicament in which he was placed, and taking intelligent measures to meet it? Did he realize the gravity of the offense with which he was charged, as he would if in the possession of his ordinary mental faculties? Not that he should have been so much affected by it as some other men would if he had been in possession of his ordinary mental vigor and coherence of ideas.

All the evidence tends to show that he was at one time, and not many years ago, a man of clear mental perceptions, understood the ordinary obligations which one man owes to another and to society, and while he may have been shrewd and sharp at a bargain, and perhaps exacting in enforcing

what he deemed a legal or business advantage over those with whom he was dealing, yet there is no proof but that he recognized the ordinary moral and legal obligations of business, and was as truthful and upright as ordinary men in their dealings. And I think it may be considered as proven, that in the last two or three years, since the loss of his children, to some extent, and since the commencement of his troubles with Miss Warren in a more palpable degree, his most intimate friends have noticed a marked change in his manner, conduct and habits of thought.

Does the proof satisfy you that the change in the man shows that he has become insane, or so far insane as to be incapable of properly caring for himself? And a single act of eccentricity or of irrational conduct is not evidence of insanity, but a group or series of unnatural acts may properly be considered as tending to prove insanity. Or were these acts the result of his giving way to a naturally violent temper and jealous disposition? Were these exhibitions the result of insanity, or mere neglect to properly rule his own spirit? Has he simulated insanity, or was he in fact insane at the time of his trial?

The name of the disease is not important if the man is really crazy. It makes no difference whether it is called paralysis of the insane, or paresis—or by some other name—if the fact of insanity exists. Doctors may disagree as to a diagnosis of disease, but we have nothing to do with mere names.

While the burden of proof may be said to be on the defendant, to satisfy you that he is in fact insane, yet, if the proof, when all considered together, leaves a reasonable doubt upon your mind of this man's sanity, he should have the benefit of the doubt. That its to say, no man should be considered as a proper subject for criminal prosecution, of whose sanity there is ground for a reasonable doubt.

The question is not as stated by counsel for the prisoner, whether the defendant has had a fair trial, but whether he

was in such a mental condition as to be capable of appreciating the exigency and properly preparing for it. If he was sane, he ought to have made proper preparations for his trial. If he was so insane as not to comprehend the peril he was in, or the crime he was charged to have committed, then he ought not to have been tried, and if he is still so insane, he ought not to be sentenced for the crime of which he has been found guilty by the jury.

This case should be considered in the same light by you as if it had not been tried.

Suppose his trial was now impending, and his counsel should come into court and suggest that his client was so far insane as that he ought not to be tried, and the court as a preliminary step, had ordered a jury to be impaneled to try the question of his sanity or insanity, the duty of that jury would be precisely what yours is now—that is, to inquire into and find whether the defendant was so far insane as to be incapable of realizing the peril in which he was placed, and taking such steps as a prudent man, under the circumstances, would have taken to prepare for his trial, and whether that insane condition still continues.

If found insane by your verdict, the verdict now standing against him will be set aside.

The jury found the prisoner to have been insane at the time of his trial on the indictment.

On calling the matter for trial, the question arose as to which side should open the case. The court ruled that counsel for the prisoner should open and close the case to the jury. The question has been decided both ways in England, and seems to have been left in doubt. See 1 Russell on Crimes, p. 29, 9 Ed.—[*Reporter.*

THE THAMES LOAN AND TRUST COMPANY vs. JACOB B. JULIAN *et al.*

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1877.

IN EQUITY.

1. EQUITABLE RIGHTS OF A WIFE IN THE MORTGAGED ESTATE OF HER HUSBAND.—In Indiana a wife who has mortgaged her individual interest in her husband's lands to secure his individual debt, has an equitable right to require that her interest shall not be sold, if her husband's interest will sell for enough to satisfy the debt.

2. The wife's inchoate right in her husband's lands, contingent upon his death, or the extinguishment of his title by judicial sale, will be properly guarded by the courts.

3. Indiana Act of March 11, 1875 (1 Davis, R. S. 1875, 554), construed.

The Thames Loan and Trust Company filed its bill against Jacob B. Julian and Martha, his wife, and Arthur L. Wright, assignee of said Jacob B. Julian, to foreclose a mortgage given by the Julians on certain real estate to secure a loan of $10,000.

Martha Julian filed her cross-bill against the plaintiff and her co-defendants, averring that the debt secured by the said mortgage was not hers, but her said husband's; that she signed said mortgage simply for his accommodation; and that, as between herself and him or his assigns, her part of the mortgaged premises ought to be last sold, or not sold at all, unless necessary to make the full amount of plaintiff's debt; that said mortgaged property was worth less than twenty thousand dollars, and her interest therein was one-fourth as fee simple, which she had a right to have set off to her under the statutes of this state, on the sale of her husband's part, under such decree as may be rendered to pay said mortgage, provided it should sell for enough to pay the same, and prayed

that in the final decree the court direct that the mortgaged premises be first offered for sale subject to her inchoate right of inheritance, and if at such sale enough be bid for said property subject to her inchoate title to satisfy the decree, then her title and interest to remain to her unaffected by such decree and sale, and for all other equitable relief. To this cross-bill the assignee demurred.

Baker, Hord & Hendricks, for cross-complainants.

Claypool, Newcomb & Ketcham, for assignee.

GRESHAM, J.—The only controversy is between Mrs. Julian, and the assignee of her husband's estate, who seeks to make the mortgaged premises available for the general creditors.

Under the statutes of this state Mrs. Julian has an inchoate right of inheritance to one-fourth of the incumbered premises. [1] This interest she pledged for her husband's debt, and in doing so established between him and herself the relation of principal and surety. As between herself and her husband she has certain equitable rights. Having mortgaged her individual interest in her husband's lands for his individual debt, she has a right to say that her interest shall not be offered if her husband's interest will sell for enough to satisfy the debt. If her husband were dead, and his estate in administration, Mrs Julian would have a right as against her husband's creditors to have the entire mortgage paid out of the personal assets.[2] Her inchoate right to one-fourth of the mortgaged premises is absolute against everybody but the holder of the mortgage. She might redeem from the mortgage, and be subrogated to all the rights of the mortgagees and their foreclosure, and sell her husband's title, leaving her own unextinguished. If she should now exercise this right of redemption and subrogation, the assignee

1. *May vs. Fletcher*, 40 Indiana, 576; *Brannan vs. May*, 42 Indiana, 93.
2. *Perry vs. Borton*, 25 Indiana, 274.

might sell, subject to both the mortgage debt and her marital rights, or he might pay the mortgage debt and sell subject to her marital interest only. The wife's inchoate right in her husband's lands, contingent upon his death, or the extinguishment of his title by judicial sale, will be guarded and protected by the courts in a proper case. The case of *McCormick vs. Hunter*, 50 Indiana, 186, which was cited by counsel for the assignee as authority against the right asserted by Mrs. Julian, merely holds that "during coverture the wife has no interest in the husband's real estate which, while his interest remains in the same, can be separately conveyed."

Thus far I have considered the marital rights of Mrs. Julian without reference to the act approved March 11th, 1875. 1 Davis's Revised Statutes, 554. The act declares that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, and such inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become vested in the wife to the same extent and as absolutely as the inchoate interest of a married woman now becomes vested upon the death of her husband. Before the passage of this act the wife's inchoate right ripened into a perfect title on the death of her husband. Now her title is perfect upon the death of her husband or the extinguishment of his title by judicial sale. It is clear that the title of Jacob B. Julian to the real estate described in the mortgage is now in his assignee, Wright. If this case proceeds to a decree of foreclosure and sale, the purchaser will acquire the title of the assignee. Jacob B. Julian has no title to sell. It is only when the husband's title is extinguished by "judicial sale," that the wife's inchoate title becomes perfect under the act of 1875.

Whether an adjudication of bankruptcy on a voluntary petition is a judicial sale within the meaning of that act, is not a question necessarily involved in this case. Mrs. Julian

joined in the mortgage, and thereby as between herself and the mortgagee bound her interest in the premises for the debt.

If the land is first offered for sale subject to her marital rights (as I think it should be, for she certainly has some interest in it), the act of 1875 has no bearing upon the case otherwise than as affording additional evidence of the settled purpose of the legislature of this state to secure to married women an interest in all the real estate owned by their husbands at the time of their marriage, or that may be acquired during coverture. Demurrer overruled.

See *Pawtucket Institution for Savings vs. Bowen, ante.* p. 358—[*Reporter.*

WILLIAM PETTILON *et al.* vs. WILLIAM T. NOBLE *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY, 1877.

1. REMOVAL OF CAUSE FROM STATE COURT.—APT TIME.—A case pending in the Supreme Court of a state at the time the act of March 3rd, 1875, in regard to the removal of suits, was passed, and which was remanded from such Supreme Court for further proceedings, stands like a new cause, and consequently the right of removal may be claimed at or before the term at which the case can be tried.

2. The defendants not being obliged to re-docket the case, are not bound to take affirmative action for a removal until the complainants had caused the case to be re-docketed, of which they are entitled to due notice.

3. JURISDICTION OVER BANKING ASSOCIATIONS.—The 10th clause of section 629 of the Revised Statutes of the United States, giving U. S. Courts jurisdiction "of all suits by or against any banking association established in the district for which court is held under any law providing for national banking associations" does not invest said courts with exclusive jurisdic-

tion over this class of corporations. Their jurisdiction is only concurrent with that of the state courts.

4. If suit is brought against such banking association in a state court it has no right to remove the cause to the Federal Court.

Omar Bushnell, for complainants.

Gwynn Garnett, for defendants.

BLODGETT, J.—This is a suit in equity originally commenced in the Superior Court of Cook county, Illinois, in December, 1873. The complainants had given certain negotiable notes to the firm of W. T. Noble & Co., and secured payment thereof by a chattel mortgage.

The complainants (mortgagors) filed this bill for an injunction to restrain the negotiation of the notes, and the foreclosure of said mortgage, and to have the same declared void, for certain reasons growing out of the dealings between the mortgagors and the mortgagees.

The notes and the mortgage were, as is claimed by the defendants, transferred by indorsements for value before due, to the Central National Bank of Chicago.

The bank was made party defendant. Answers were filed by the defendants, and the case came up on motion to dissolve the injunction. The injunction was dissolved, and the court dismissed the bill without prejudice, and complainants appealed to the Supreme Court of this state.

On the 30th of January, 1875, the Supreme Court reversed the decree of the Superior Court, and remanded the case for further proceedings.

On the 15th of April, 1876, an attorney representing the defendants appeared in the Superior Court, and, on his motion in behalf of the defendants, and the presentation of the mandate of the Supreme Court, the case was re-docketed for further proceedings.

On the 14th of October, 1876, the Central National Bank filed its petition for a removal of the cause to this court. Afterwards, on November 3d, 1876, defendants filed an affi-

davit in the Superior Court, stating that the attorney on whose motion the case had been re-docketed in April, had no authority to act in their behalf, and asked that the order re-docketing the case, as of April 15th, 1876, be set aside.

This request was allowed, and the case struck from the docket. The case was then re-docketed, as of November 3rd, 1876, and then ordered to be removed to this court pursuant to the defendants' petition.

The only ground of removal alleged in the petition is the fact that the defendant, the Central National Bank, is a corporation under the laws of the United States for the organization of national banks, and that it is the chief party to the controversy in the case, and that the controversy can be determined without the other parties to the suit.

Complainants move to remand,

1st. Because the case was not removed to this court in apt time.

2d. Because no sufficient ground for removal is alleged in the petition.

When a suit is reversed and remanded in the Supreme Court of this state, it is the duty of the party seeking relief by the suit to cause the same to be re-docketed in the court from which the appeal or writ of error was prosecuted.

Here the complainants took no action to have the cause re-docketed until November last. True, an attorney assuming to act for the defendants, caused the case to be docketed in April, 1876, but this action was repudiated by the defendants, and the Superior Court which had the sole right to pass on that question sustained the defendants' motion to strike from the docket.

The application for a removal of a cause must be made "before or at the term at which said cause could be first tried." It has been held that a case pending in the Supreme Court of a state, at the time the act of March 3d, 1875, in regard to the removal of suits, was passed, and remanded from such Supreme Court for further proceedings, stands like a new

cause, and consequently the right of removal may be claimed at or before the term at which the case can be re-tried.

The defendants, not being obliged to re-docket the case, are not bound to take affirmative action for a removal until the complainants had caused the case to be re-docketed, of which they are entitled to due notice.

Here the unauthorized action of the attorney in docketing the case in April being set aside by the court, the case stands precisely as if it had first appeared on the docket of the Superior Court on the 3d of November last. I think, therefore, that the defendant bank made the application for removal within apt time.

The act of March 3d, 1875, to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from state courts, etc., provides as follows:

"SEC. 2. That any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same states claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit in the Circuit Court of the United States for the proper district."

Now, while by the 10th clause of section 629 of the Revised Statutes of the United States, the Circuit Courts of the United

States are clothed with jurisdiction " of all suits by or against any banking association established in the district for which such court is held, under any law providing for national banking associations," it will be seen that this court is not invested with exclusive jurisdiction over this class of corporations. Our jurisdiction is only concurrent with that of the state courts.

And the statute in regard to the removal of causes from the state to the federal courts does not, in terms, give this class of corporations the right to remove a suit. The defendant at whose instance this case is brought here is a resident of this district. The complainants might, under this act of Congress, have sued this defendant in this court, but if the complainants elect another tribunal, can the defendant bring this suit here? The only reason urged why this can be done is, that this defendant derives its corporate existence under a law of the United States, and it is therefore claimed that the case is one "arising under the constitution or laws of the United States," within the meaning of that clause in the second section of the act of March 3d, 1875.

In *Bank of the United States vs. Devereaux et al.*, reported in 5 Cranch, 61, it was held that although the old United States Bank was created by act of Congress, yet, as it was not specially authorized to sue or be sued in the federal courts, those courts had no jurisdiction, while in the later case of *Osborn vs. United States Bank*, 9 Wheaton, 819, it was held that the federal courts had jurisdiction, because the charter expressly provided therefor; and one of the main questions discussed and passed upon in that case was the constitutionality of this provision, the court in substance holding that as the bank was a creature of federal legislation, it could give the federal courts jurisdiction over it. But I do not construe that case as going to the extent contended for by defendants' counsel in this case, that because Congress had created the bank in question, therefore it could sue or be sued in the federal courts. The reverse of this doctrine was held in the

case I first cited, and was not overruled in the latter case.

So, too, the federal courts are clothed with jurisdiction in all cases where the United States are plaintiffs in a suit at law, or petitioners in a suit of equity, and yet Congress seems to have deemed it necessary to expressly confer upon the United States the right to remove a suit commenced by themselves in a state court to the federal courts.

Then again, by section 640, Revised Statutes of the United States, it is provided that: "Any suit commenced in any court other than a Circuit or District Court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof, as such member for any alleged liability of such corporation, or of such member as a member thereof, may be removed for trial, in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution, or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section." Here the right of removal is expressly denied to banking corporations.

In the light of these authorities and the reason of the law, I conclude that this defendant had no right to remove this cause to this court. The motion to remand will therefore be sustained, and the cause is remanded.

In re R. C. WORTHINGTON.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—JUNE, 1877.

1. NON-JURIDICAL DAY—ENTRY OF TRANSCRIPT OF JUDGMENT ON CHRISTMAS DAY—MINISTERIAL ACT.—The act of the circuit clerk in filing the docket transcript of a judgment, is a ministerial act, and not void, though done on a non-juridical day, and the judgment creditors thereby acquired a lien upon the real estate of the judgment debtor the same as if done on any other day.

Cottrill & Cary, for assignee.

Jenkins, Elliot & Winkler, for judgment creditors.

DRUMMOND, J.—On the 24th of December, 1874, Charles E. Storm and Robert Hill recovered a judgment against the bankrupt in the Circuit Court of Milwaukee county, for $3,464.

On the following day a transcript of the docket was filed in the clerk's office of the Circuit Court in Wood county, where the bankrupt had, at the time, real estate. Several months after this, proceedings in bankruptcy were commenced, and Worthington was adjudged a bankrupt in July, 1875.

The judgment creditors made an application to the District Court to direct the assignee to sell the real estate of the bankrupt, and apply the proceeds to the payment of the judgment, and to permit them to prove their claim for any balance that might be found due. This application was denied by the District Court, on the ground that the act of filing the transcript by the clerk in Wood county was void, and gave the judgment creditors no lien upon the property, as it was done on Christmas day—a holiday under the laws of this state.

By the law of this state, the clerk of the Circuit Court was required to keep a book for the entry of judgments, and im-

mediately after entering the judgment the clerk was to file certain papers which were to constitute what was called the judgment roll, which was to contain a copy of the judgment; and after this was done he was to enter in an alphabetical docket, in books to be provided and kept by him, a statement of the judgment, and containing certain particulars as set forth in the statute, namely: the names of the parties, the amount of the debt or damages recovered, with the costs, the hour and day of entering in the docket, etc., and then the judgment became a lien upon the real estate of the debtor. And when it was sought to cause the real estate of the debtor to become bound by the judgment in any other county than that where it was rendered, it became necessary to file with the clerk of the Circuit Court of that county a transcript of the original docket, and from the time of filing it constituted a lien on the property of the debtor in that county.

The question then to be determined in this case, is, whether the act of the clerk in filing the transcript of the original docket in his office on Christmas day, was a nullity under the laws of this state.

The statute declares that no court shall be open, or transact any business on the 22d of February or the 4th of July, unless to instruct or discharge a jury or to receive a verdict, and the 25th day of December and the 1st day of January are declared to be holidays. If the act of the clerk was void, it was so under the common law, or these statutes.

At common law, Sunday was deemed a non-juridical day, during which no courts could transact any business or render any decree. Of course, at common law, some of the days which, under our practice, are deemed non-juridical, were unknown as such; and when they are so declared, the inference would be that the prohibition extends no farther than is named in the statute. It is hardly to be presumed that ordinary business cannot be transacted in this state, and binding contracts entered into, on the 22d day of February or the 4th of July, and the question is, whether because the 25th

day of December and the 1st of January are declared to be holidays, that, therefore, no ministerial act can be performed on those days by an officer of this state. It may be conceded that on those days a clerk could not be required to perform any duty connected with his office, because the state has declared it a holiday; but that is a very different thing from asserting that every ministerial act done by the clerk voluntarily on those days is necessarily void. The statute in relation to the 22d of February and 4th of July was passed in 1861; but when there was legislation in 1862 as to the 25th of December and 1st of January, there was no prohibition in relation to the courts, except what might be inferred from the fact that they were declared holidays. It was not till afterwards (1869) that it was declared that when the day for the meeting of the court should fall on a legal holiday, it should be adjourned to the following day.

While at the common law no judicial act could be done on Sunday, the authorities seem to agree that mere ministerial acts could be performed, and the service of the process was regarded as a ministerial act, and therefore valid, although performed on Sunday, and the act of 29 Charles II, became necessary in order to render it invalid, and in the case of *Van Vechten vs. Paddock*, 12 Johnson, 187, which is relied upon, by the District Court, the Supreme Court of New York, in order to decide that the issuing of process on a Sunday was void, insisted that the awarding of the process was a judicial act, done whilst the court was in actual session, being thus obliged to resort to an acknowledged fiction to sustain its opinion.

If ministerial acts performed on Sunday were not invalid at common law, for a stronger reason those performed on Christmas day would not be invalid. It is a curious fact that while the judge of the court who gave the opinion in *Van Vechten vs. Paddock*, seems inclined to hold that the service of process on Sunday was illegal at common law, the judge who delivered the opinion in *Johnson vs. Day*, 17 Pickering, 106

declares that an arrest on civil process on Sunday was legal at common law, and that is the opinion of the judge who decided the case of *Pearce vs. Atwood*, 13 Massachusetts, 324, where the subject is thoroughly discussed. The District Court relied upon the case of *Lampe vs. Manning*, 38 Wisconsin, 673, as deciding that the act of the clerk here in question was void. But in fact that case only decided that a trial and judgment rendered by a justice of the peace on the 23d day of February, and which, under the statute, as coming on Monday, was to be treated as the 22d—and, therefore, a holiday—were invalid, and should be regarded as a nullity, and the court says nothing about the effect of ministerial acts done on a holiday. The natural conclusion would seem to be, that when the state legislature in 1861, legislated in relation to the 22d of February and 4th of July, and made prohibitions, and then again legislated in 1862 as to the 25th of December and 1st of January, the prohibitions should not, by construction merely, be enlarged.

It may be admitted that the entry of a judgment by which a man's property is to be bound, or, as it is termed in the statute of this state, the docketing of the same, is a very important act. The entry of the judgment is judicial, but is the docketing of the judgment by the clerk anything more than a ministerial act? There is no exercise of discretion or of judgment, but the language of the statute to him is mandatory. He shall do certain things, and they are particularly described, and in relation to them he can have no discretion; and it would seem that they were mere ministerial acts. And while this is true of the act of the clerk who dockets the judgment in the court where it is rendered, it would seem that where it is transferred to another county and docketed there, that there could be, if possible, less doubt of the character of the act to be performed by the clerk of that county; because all that the statute requires is, that a transcript of the original docket shall be filed with the clerk of the Circuit Court of the county, so that all that is necessary for the clerk to do

is simply to receive the transcript which is brought to him, and file it, and mark it with the date when it is filed. This certainly can be considered nothing more than a ministerial act, not void at common law, and, I think, not rendered so by any statute of this state.

There does not seem to be any statute of this state, which when fairly considered, declares that no official act shall be performed on a holiday. In referring to holidays I do not intend to include Sundays, as to which there is considerable prohibitory legislation by this state, affecting business, public and private, labor, amusements and the service of civil process.

I think, therefore, the act of the clerk of the Circuit Court of Wood county, in filing the docket transcript was not void, but that the judgment creditors acquired a lien on the real estate of the bankrupt in that county.

The order of the District Court will therefore be reversed; but as the judgment of this court cannot be reviewed in this case, I shall authorize the District Court, if it shall consider it best, to permit the judgment creditors to proceed on their judgment, and sell the real estate of the bankrupt in Wood county; and then if the other creditors of the bankrupt desire, the right of the purchaser to the property can be tested by the assignee.

SEYMOUR *et al.* vs. THE PHILLIPS AND COLBY CONSTRUCTION COMPANY *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1877.

1. JURISDICTION.—The United States Circuit Court has jurisdiction of a suit upon a supersedeas bond given in that court, independent of the citizenship of the parties.

2. EFFECT OF RULE OF UNITED STATES SUPREME COURT.—A rule established by the United States Supreme Court in pursuance of law, becomes, essentially, a part of the law itself.

The plaintiffs recovered a judgment in this court against the Phillips & Colby Construction Company, in July, 1873, and thereupon the defendants in that case sued out a writ of error to the Supreme Court of the United States, and gave a supersedeas bond, to which the defendants in this case are parties, as obligors. The writ of error having been dismissed, and the judgment of this court affirmed, a suit was brought upon the bond given, to which a plea in abatement is put in, alleging that all the plaintiffs and all the defendants are citizens of this state, and that this court, therefore, has no jurisdiction of the case.

Sleeper & Whiton, for plaintiffs.

Dent & Black, for defendants.

DRUMMOND, J.—The question is, whether, in consequence merely of the suit being upon a bond given under the circumstances mentioned, this court has jurisdiction of the case, independent of the citizenship of the parties; and I am inclined to think that it has.

So far as I have been able to investigate the subject, I am

of opinion that this court has jurisdiction, on account of the nature of the controversy. I leave out of view one very strong aspect of the case, which was presented by the counsel for the plaintiffs, namely: that growing out of the fact that this may, in one sense, be said to be an incident of the original suit—something inseparably connected with it, and that owing to that circumstance alone, independently of the nature of the controversy, the court might have jurisdiction precisely as it would of a bill filed (connected with a judgment at law), on the equity side of the court, of which, as is well known, the court has jurisdiction, irrespective of the citizenship of the parties. Waiving that view of the case at present, I think the nature of the controversy is such as to give the court jurisdiction.

Section 1000 of the Revised Statutes of the United States, which re-enacts a provision of the act of 1789, declares that when a judge signs a citation on any writ of error, "he shall take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where a writ is a supersedeas, and stays execution; of all costs only where it is not a supersedeas, as aforesaid." This does not prescribe the particular form of the security. In practice, the security has uniformly been, under this statute, a bond given by the party in the usual form, and because it is such a bond, the defendants contend that the obligations growing out of the bond are of a common law character, and really give rise to no question under the laws of the United States. But it is clear that in one sense the obligation must be determined by the law of the United States, namely, this statute—"If he fail to make his plea good he shall answer all damages and costs." Now what are those damages and costs must be determined by a construction to be given to this statute, because it is this statute which constitutes the measure of damages, and is the law governing the rights of the parties. Section 1007 of the Revised Statutes is substantially

the same as the act of 1789 amended by the act of the 18th of February, 1875, after the passage of the law authorizing an extension of time to sixty days, to give the bond. What is the law upon the subject can be further ascertained by referring to rule No. 29, adopted by the Supreme Court of the United States. A rule established by the Supreme Court of the United States in pursuance of law, becomes, to all intents and purposes, of the same effect as the law itself, and where the court prescribes a rule as to the kind of indemnity that shall be given, then it becomes a rule under the law, and substantially a law of the United States. Now this was a supersedeas bond, and the rule is this: "Supersedeas bonds in the circuit courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal," &c. Whatever questions there are, must arise under the law and under this rule. Whenever any question comes up in a controversy between parties upon a bond thus given, what court is to decide it;—what was the intention of the law in relation to the determination of that controversy? Is it not manifest, that if it be true that a state court may have jurisdiction of the case, it is only concurrent with the jurisdiction of the Federal Court, and that the Federal Court is peculiarly the tribunal that ought to decide all such questions, because they are questions that arise under the acts of Congress, or under rules of court passed in pursuance of acts of Congress; and is it not also manifest that if a state court took jurisdiction of such a controversy, that it might ultimately, under the law or under the rule, be carried to the Supreme Court of the United States? And that position was not seriously controverted in the argument. If that

is so, how can the court say, upon the declaration on the bond, that there may not necessarily arise some question which is not a mere common law question, but may become a question under the statutes or under the rule; and must it affirmatively appear before the court can take jurisdiction of the case, that there will be necessarily a question arising under the statutes or under the rule? It was said, and perhaps that constituted the strongest argument on the part of the defense in presenting the demurrer, that it did not follow, because there was a contract made under an act of Congress, or a bond given, that therefore the Federal Court could necessarily take jurisdiction of the case. Perhaps that is so. The case of *Wilson vs. Sandford*, 10 Howard, 99, was a case where there was a contract made growing out of a patent right, and the court held, where the question was whether or not the Supreme Court of the United States had appellate jurisdiction in the case, that it had not, because it affirmatively appeared that there was no question arising under the patent law; that it was simply a contract made in relation to a patent right, all questions connected with which were to be determined independently of the statute upon the subject of patents.

Now, if it affirmatively appeared in this case that it was so; if, in other words, it did appear that there was no question arising in this case, either under the act of Congress or under the rule of the court, then it might be brought within this decision; but it is manifest that if the question had been in relation to the validity of the assignment of a patent right, then it would necessarily come within the jurisdiction of the Federal Court, because it would be a question arising under an act of Congress covering patent rights, and I apprehend that the Supreme Court in this case does not intend to intimate that if such a question had come up on the validity of an assignment, as authorized by an act of Congress, that the court would not have had appellate jurisdiction of the case, although the amount in controversy might not have been two

thousand dollars—the Supreme Court of the United States having jurisdiction independently of the amount in controversy in patent cases.

The first section of the act of the 3d of March, 1875, which we have had occasion so often to examine since it was passed, declares that "circuit courts of the United States "shall have original cognizance concurrently with the courts "of the several states, of all suits of a civil nature at common "law or in equity, where the matter in dispute exceeds, "exclusive of costs, the sum or value of five hundred dollars, "and arising under the Constitution or laws of the United "States." Now, is this not a matter in dispute arising under the laws of the United States, as it is presented upon the face of the pleadings? It is an indemnity given in pursuance of a law of the United States; the measure of the liability of the party, and the rights both of the plaintiffs and the defendants, depend upon a law of the United States, and a rule of the Supreme Court of the United States. It is impossible to take a step in the progress of the cause in order to determine the rights of the parties, without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case.

From the best consideration that I have been able to give this case, therefore, I think that the court has jurisdiction. It is a little singular that no case precisely in this form has been reported.

The argument *ab inconveniente* is not without weight in determining this question. It is a controversy springing out of a suit already determined in the Federal Court. It is in one sense an off-shoot of that suit. It would seem upon principle, that this is the proper forum to settle all controversies growing out that suit. If it were a question connected with an execution, and a bill had been filed, as already stated, this court would be the proper forum to determine any such controversy. This is a bond growing out of that suit; it would seem that this is the proper forum to settle all contro-

versies connected with the execution of the bond, and the rights of the parties, particularly as to the liabilities of the obligors to the bond; so that conceding that it may in one sense be considered a new question, I feel inclined to establish a precedent that the Federal Court is the proper forum to settle the rights of the parties.

The demurrer, therefore, to the plea in abatement will be sustained, reserving the right to the defendants to move in arrest of judgment.

THE WAVERLY.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—JUNE, 1877.

IN ADMIRALTY.

1. LIBEL FOR SEAMEN'S WAGES.—The remedy given to seamen by section 4546 and 4547, of the U. S. Revised Statutes, as preliminary to the filing of a libel for wages, is not exclusive, but cumulative merely.

2. PRELIMINARY PROCEEDINGS NOT NECESSARY.—A libel for seaman's wages may be filed, and process for the arrest of a vessel obtained without resort to the preliminary proceedings authorized by said sections.

3. Those sections examined and construed in connections with section 6 of the act of 1790.

4. CUMULATIVE REMEDY.—The common law rule that a statutory remedy which does not negative the remedy at common law is cumulative is applicable to remedies under the maritime law.

This was a libel for seaman's wages.

The libel alleged that about the 5th day of October, 1876,

the steamer Waverly was lying at the port of Cleveland, bound on a voyage to Chicago, and thence back to Buffalo; that the master hired libellant to serve on board the steamer as a seaman, at stipulated monthly wages; that libellant signed shipping articles, and in pursuance thereof went on board and entered into the service of the steamer. That about the 7th of October, and while the steamer was at sea, the libellant was, by sickness, rendered unable to perform the duties of a seaman; and on the arrival of the steamer at Milwaukee, to which port some part of her cargo was consigned, being unable to obtain medical treatment on board, he was obliged to leave the vessel; that he demanded his wages from the time of shipping on board up to the time of his arrival in Milwaukee, which the master refused to pay.

The libel further alleged that a certain amount was unpaid and due to the libellant, and that the steamer, at the time the libel was filed, had left the port of Milwaukee.

To this libel the respondent filed a plea, in which, among other things, it was alleged, that prior to the filing of the libel and the issuing of the monition, the master of the steamer was not summoned by the district judge, or by a justice of the peace, or commissioner of the Circuit Court, to appear before him and show cause why process should not issue against the steamer.

Babcock & Stone, for libellant.

Cottrill & Cary, for respondents.

DYER, J.—The point made in this case is, that inasmuch as the preliminary proceeding authorized by sections 4546 and 4547 of the Revised Statutes, were not taken previous to the filing of the libel, the court has not jurisdiction to proceed with the cause; and the question submitted for decision is, whether in a case touching seamen's wages, it is necessary that this preliminary proceeding, should be taken, before a libel can be filed and monition issued.

The present statute, in relation to these preliminary proceedings, is substantially like the act of 1790.

There are some changes in phraseology, but in substance the provisions of the two statutes are the same.

Section 6 of the act of 1790 [1] provides first, "that every seaman or mariner shall be entitled to demand and receive from the master or commander of the vessel to which he belongs one-third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo, before the voyage be ended, unless the contrary be expressly stipulated in the contract; and, as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract."

The same clause in substance may be found in section 4530 of the Revised Statutes, the language of that section being: "Every seaman shall be entitled to receive from the master of the vessel to which he belongs, one-third part of the wages which shall be due to him at every port where such vessel shall unlade and deliver her cargo before the voyage is ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast is fully discharged at the last port of delivery, he shall be entitled to the wages which shall be then due."

The only material difference between that section and the first clause of the 6th section of the original act is, that the words "according to the contract" after the word "due," at the end of the first clause in section 6, are omitted from section 4530, an omission, however, which is quite inconsequential, because it is evident from an examination of the entire statute that it is treating exclusively of cases where seamen have entered into employment under written contract, and that the case of one who engages in service as a

1. Vol. 1 Statutes at Large, Ch., 29, p. 131.

seaman, under agreement not in writing, is not embraced within the provisions of this statute.

Now, following still further the language of section 6 of the act of 1790, we find it there provided, that "if such wages shall not be paid within ten days after such discharge, or, if any dispute shall arise between the master and the seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace to summon the master of such ship or vessel to appear before him to show cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of admiralty courts, to answer for the said wages."

This section then further provides that, "if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited; and if the matter in dispute shall not forthwith be settled, in such case, the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon process may issue.

At the end of the section is also this provision: "but nothing herein contained shall prevent any seaman or mariner from having, or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast."

These provisions of section 6 are incorporated substantially into sections 4546 and 4547 of the present Revised Statutes.

The differences in language are these: Section 4546 begins, "whenever the wages of any seaman are not paid," etc.

The language of section 6 in the act of 1790 is, "and if such wages shall not be paid within ten days after such discharge," etc.

This variance is clearly one of phraseology only. The word "such" is used in the 6th section of the original act in that connection, because immediately preceding it, and as part of that section, is the provision which declares when and at what ports a seaman shall be entitled to demand his wages or some share thereof, while in section 4546 of the Revised Statutes, it was necessary that the word "such" should be changed to "the," because the provision in relation to the payment of the wages was in a preceding independent section, (4530).

There are some further differences in the language of these statutes, and I refer to them particularly since upon the argument it was claimed that because of these variances the provisions of the Revised Statutes on the subject should receive a different construction from that heretofore placed upon the act of 1790.

In section 6 of the original act it is provided that "if any dispute shall arise between the master and the seamen or mariners touching the said wages, it shall be lawful," etc.

The language of section 4546, Revised Statutes, is, if "any dispute arises between the master and the seamen touching wages, the district judge," etc.; the words, "the said" in section 6, of the act of 1790, being omitted from section 4546, of the Revised Statutes, and in this respect it is urged that the present statute is more comprehensive than the original act, and hence should receive a broader construction.

But to what wages does this provision of section 6 refer? Clearly, to wages that have been spoken of in the previous provision of the section, namely, the wages which the seaman is entitled to demand at different ports, and upon the happening of certain events.

Then, to what wages does section 4546 of the Revised Statutes refer? The words "the said" being there omitted,

it is nevertheless clear that the section refers to such wages as have been previously spoken of in this chapter (Chapter 3, Title 53, Revised Statutes), because it is concerning no other wages that any legislation is attempted. They are wages due to a seaman upon the contract which he has made, and which it is declared by section 4530,—which corresponds, as we have seen, with the first clause of section 6, in the act of 1790—shall be due in certain installments, and at certain times. It is plain, therefore, that in this respect there is no substantial difference between these statutes.

It is to be observed, also, that the language at the end of section 4547, is in substance identical with that at the end of section 6 of the act of 1790.

Again it is insisted that the provisions of the present statute are of broader import than these of section 6, of the act of 1790, because in the latter section the language is that "it shall be lawful for the judge of the district," etc., "to summon the master," etc., while in section 4546 of the Revised Statutes, it is provided that the district judge may summon the master, etc.; and it is contended that the word "may," as thus used, means "must," thus making the language of the section imperative, while that of section 6 of the act of 1790 is confessedly permissive merely. I do not think the statute should be so construed. The language of both statutes in the particular referred to is, under a fair and reasonable construction, equivalent. The change is merely one of words and not of meaning.

I conclude, therefore, upon a comparison of these two statutes, that the only differences in their respective provisions, are purely differences in phraseology; and it has seemed important to determine whether this is so or not, because if they are substantially the same, then the construction which may have been given to the act of 1790, with reference to the question here involved, would be applicable in construing the present existing provisions as contained in the Revised Statutes

Now as an original question it may be said that there is strong ground for contending that this statute was intended as a limitation upon the right of a seaman to have immediate process from a court of admiralty against a vessel.

Forcible argument may be made in favor of the proposition that it was the intention of Congress, in passing that act, to put seamen upon a different footing from that occupied by other parties, who might at once appeal to the maritime law, and obtain immediate process for the arrest of vessels; and there are not wanting cogent reasons which support such an argument.

There are, however, decisions upon the question so direct, and which emanate from sources so eminent that they can hardly be disregarded. One of those decisions is found in the case of *The M. W. Wright*, 1 Browns' Admiralty Reports, 290, and the other in the case of *The Ship Wm. Jarvis*, Sprague's Decisions, 485.

It may be considered also in this connection, that it has been long the practice of this court, and the practice of the District Courts in other districts, to treat these provisions of the statute to which I have referred, as furnishing rather an optional and cumulative remedy, than one which excludes a seaman from the right, or privilege, in the first instance, to resort to process in admiralty.

In the case of *The M. W. Wright, supra*, Judge LONGYEAR had occasion to construe section 6 of the act of 1790, and he applied to it the familiar rule of construction, that "where a right or remedy exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old common law, the party has his election either to sue at common law, or to proceed upon the statute."

This rule, of course is as applicable to remedies under the maritime law, as it is to those under the common law; and upon a consideration of the question it is held in the case cited, that the proceedings authorized by section 6 of the act of 1790, are merely cumulative.

There is no provision, says the court, expressly negativing the old law which gave to a seaman the right to commence suit *in rem* in the Admiralty Court, by libel, and arrest of the vessel in the first instance; and the language used in conferring the right to such new proceeding, is certainly very far from implying such negative.

The opinion concludes: "I hold, therefore, that the preliminary proceedings by summons, &c., prescribed by section 6, of the act of 1790, are cumulative, and in addition to the ordinary proceeding by libel according to the admiralty practice, and may be resorted to or not, at the option of the libellant."

In the case of *The ship Wm. Jarvis*, *supra*, Judge SPRAGUE discusses the question at length, and holds that the act is permissive, not imperative; that it gives only a cumulative remedy, and that the judge, or the court, has the power, notwithstanding the statute, to order process against a vessel without previous summons to the master. The question, when simplified, seems to be this—can a seaman, without resorting to this preliminary proceeding, apply to the judge or to the court, and in the first instance, upon such application obtain ordinary admiralty process for the arrest of the vessel, or is the proceeding authorized by the statute exclusive in such a case?

In settling that question I think I must be controlled by the decisions to which reference has been made, and shall therefore hold, that the remedy conferred by this statute is not exclusive, but is cumulative, and that the right of a seaman to usual admiralty process is not dependant upon a previous resort to the preliminary proceeding authorized by sections 4546 and 4547.

Plea overruled, with leave to answer.

In re JEWETT *et al.*

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—JUNE, 1877.

IN BANKRUPTCY.

1. JURISDICTION OF COURT—PRIOR ADJUDICATION IN ANOTHER DISTRICT.—Proceedings in bankruptcy in one District Court against a firm, constitute no bar to similar proceedings in another district against another firm, some of whose members were also members of the former firm.

S. U. Pinney, for assignee of S. A. Jewett & Co.

W. A. Vilas, for E. D. & G. K. Jewett.

DRUMMOND, J.—These are the material facts in this case: There was a firm in Boston doing business under the name of Jewett & Pitcher, of which E. D. Jewett and George K. Jewett were members. We must assume, for the purposes of the decision, that there was also a firm transacting business in Wisconsin, of which S. A. Jewett, E. D. Jewett, and George K. Jewett were members, under the name of S. A. Jewett & Co.

In October, 1875, S. A. Jewett was a resident of Wisconsin, E. D. Jewett a resident of New Brunswick, Dominion of Canada, and George K. Jewett a resident of Maine. At that time a petition in bankruptcy was filed in the District Court of Massachusetts, against the firm of Jewett & Pitcher. All the other members of the firm, except E. D. Jewett and G. K. Jewett, were residents of Massachusetts. A decree in bankruptcy was rendered against that firm on the 25th of February, 1876, in the District Court of Massachusetts, and of course that decree proceeded against E. D. and G. K. Jewett, as members of the firm of Jewett & Pitcher; and it

is alleged, in the petition of review, that although E. D. Jewett was a resident of New Brunswick at the time the petition in bankruptcy was filed in Massachusetts, he afterwards changed his residence to Massachusetts, and appeared in the case as a party; and it is also alleged that both E. D. Jewett and G. K. Jewett filed their schedules in the case at Massachusetts, setting forth their debts and their assets jointly and individually. This is all that appears in relation to the proceedings in Massachusetts.

It is not stated that the bankrupt case is disposed of, or that the debts of the firm of Jewett & Pitcher are settled, or that they were discharged as bankrupts. The inference from the statement is, that the suit, as such, is still pending in the District Court of Massachusetts, or was at the time the facts, which are now to be mentioned, occurred.

In July, 1876, a petition in bankruptcy was filed in the District Court for the western district of Wisconsin, against the firm of S. A. Jewett & Co.—the Wisconsin firm—and of which E. D. Jewett and G. K. Jewett were members. E. D. Jewett and G. K. Jewett appeared to the petition and denied the acts of bankruptcy alleged, and among other things set forth the proceedings in the District Court of Massachusetts, which have already been referred to, and alleged that a decree in bankruptcy had been rendered against them as members of he firm of Jewett & Pitcher; and they insisted that that constituted a bar in the District Court of the Western District of Wisconsin, to a decree in bankruptcy against them.

There were various questions argued by the counsel of the bankrupts, as I infer, in the District Court, and they have been again argued in the Circuit Court—most of which will have to remain, for the present, undecided. The District Court found a partnership to exist between the three persons, S. A., E. D., and G. K. Jewett, and held that the fact of a decree in bankruptcy against E. D. and G. K. Jewett, as members of the firm of Jewett & Pitcher, in the District Court of Massachusetts was not a bar, and did not defeat the

petition in bankruptcy in the District Court for this district.

And the only question now before this court is, whether that does constitute a bar to or defeat the petition in bankruptcy here. I think that the decree of the District Court was right.

The firm of S. A. Jewett & Co. were engaged in the lumber business in Wisconsin quite extensively, the business amounting, as is said, in the course of a year to about one hundred thousand dollars. They had become embarrassed, and a petition in bankruptcy was filed against them. Their creditors insisted that their property should be administered by the court under the bankrupt law for the payment of their debts. There was no way in which this could be done except by a decree of bankruptcy against the partners; and it seems to me clear, that the proper forum in which the decree should be rendered was that which existed in the district where they were transacting business, namely, in the Western District of Wisconsin. There was no other way by which these partnership assets could be reached and administered in the bankrupt court, unless S. A. Jewett, as a member of the firm of which E. D. and G. K. Jewett were also members, was called, in some form, into the District Court of Massachusetts, and the assets of the firm of S. A. Jewett & Co., administered there, namely, the residuary interest which E. D. and G. K. Jewett had in them after the settlement of the claims against the firm of S. A. Jewett & Co., because I assume that the only interest which E. D. and George K. Jewett, or their assignee had, either as representing the firm of Jewett & Pitcher, or themselves individually, was the residuary interest which they or either might have in the assets of S. A. Jewett & Co., after the payment of the debts of that firm.

It is clear as a principle of law, it seems to me, that the firm assets of S. A. Jewett & Co., must be administered in the District Court of this district, for the payment of the debts of that firm. It is also true that until all the debts are paid, neither E. D. Jewett nor George K.

Jewett has any interest in these firm assets. It is equally true that the firm assets of Jewett & Pitcher must be administered in the District Court of Massachusetts.

Now S. A. Jewett has no interest whatever, residuary or otherwise, in the assets of Jewett & Pitcher; he is not concerned in that firm; of course, therefore, he could only be brought into the bankruptcy litigation in Massachusetts as a member of the firm of which two persons, parties to the litigation in that court, were also members. This being so, the only difficulty that can arise is as to the individual property of E. D. and George K. Jewett. The fact that they were adjudged bankrupts here, as members of the firm of S. A. Jewett & Co., does not necessarily dispose of all the questions that may arise concerning that property. It may be that many delicate and difficult questions may arise as to the property. For example, it appears that E. D. and George K. Jewett owned two-thirds of a large tract of land in this district, of which S. A. Jewett owned one-third.

It is claimed that a decree in bankruptcy, with the deed to the assignee in Massachusetts, clothed him not only with the title to the joint property, but also with that of the individual property of each member of the firm of Jewett & Pitcher. Now, whether that individual property should go to pay debts of Jewett & Pitcher, if the joint property is not sufficient to accomplish that result, or to pay debts of S. A Jewett & Co., the Wisconsin firm, may be a very serious question, which I do not feel inclined to decide, or even intimate an opinion upon at present. The most that can be said is, that E. D. and George K. Jewett have already been adjudged bankrupts in the District Court of Massachusetts; they are again adjudged bankrupts in the District Court of the Western District of Wisconsin. But in the one case they have been adjudged bankrupts as members of the firm of Jewett & Pitcher, and in the other of S. A. Jewett & Co.

Strictly, the District Court of the Western District of Wisconsin had the right to adjudge them bankrupts as members

of the firm of S. A. Jewett & Co., and this is all I care to decide at present. Therefore, as this petition was filed by E. D. and George K. Jewett for the purpose of reviewing the decision of the District Court, and, as I hold that the decision was right, the order of the District Court decreeing them bankrupts will be affirmed. When, hereafter, it is ascertained what is the exact situation of the joint property of S. A. Jewett & Co., and of the individual property of the members of the firm in this district, a question may arise as to what shall be done with the latter, and how and by what means it shall be administered, and for whose benefit.

For the opinion of the District Judge see *In re Jewett*, *ante*, p.—[*Reporter*.

In re LONGEST.

DISTRICT COURT.—DISTRICT OF INDIANA.—JULY, 1877.

IN BANKRUPTCY.

1. PROOF OF DEBT.—A creditor may come in at any time before the hearing of the petition for the bankrupt's discharge, prove his claim, and file objections.

2. THIRTY PER CENT.—The bankrupt is not entitled to his discharge unless assets have come to the hands of his assignee amounting to thirty per centum of all the claims proved at any time before the final hearing of the petition for discharge.

3. CERTIFICATE OF CONFORMITY—By the Register is not conclusive upon the court.

Longest was a voluntary bankrupt. On December 11th, 1875, he filed his petition for his discharge, which was set down for hearing December 28th, 1875. When this petition

was filed, no debts had been proved against his estate; but before the day set for the hearing, William S. Culbertson and other creditors proved their claims, and on the 28th of December, 1875, they filed objections to the bankrupt's discharge. One of the objections assigned was, "that the value of the assets which came to the hands of the assignee did not amount to thirty per centum of the claims proved against his estate." A certificate of conformity was filed with the clerk.

The matter was referred to one of the Registers of the court, who reported that no debts were proved against the bankrupt's estate previous to the filing of his petition for his discharge; that certain debts were proved after the filing of the petition for discharge, and before the hearing of the petition; that the assets did not amount to thirty per centum of the claims so proved; that, in his opinion, the certificate of conformity related to the state of things existing at the date of the filing of the bankrupt's petition for his discharge, and that debts subsequently proved ought not to be considered in determining whether the assets amount to the thirty per centum required by the bankrupt act.

William Farrell, for bankrupt.

Alexander Dowling, for creditors.

GRESHAM, J.—The act imposes no limitation whatever upon the proof of debt by a creditor. It is the rule, settled in this district and generally recognized, that a creditor, whose debt is not proved, has no standing in court, and so cannot be heard to object to the discharge of a bankrupt. But, as he has the right to prove at any time, it was held at an early day, and the practice has been uniform, that he may prove his debt for the purpose of getting such a standing and filing objections. Up to the time of hearing, is there any restriction upon this right of the creditor to interpose any objection which the law allows, whether it is the insufficiency of assets, or any other objection? The ruling of the Register in this

case leaves that right as to all other objections but that of insufficiency of assets, unimpaired. Otherwise there could be no instance found in which a creditor could ask leave to prove his debt as the means of resisting a discharge. I presume it would not do to say that the report made by the Register in return to the order of court, that the bankrupt had in all things complied with the provisions of the law, is conclusive as to that conformity. This report is a part of the machinery of the law to satisfy the mind of the court, and is only one of the means of ascertaining that the bankrupt's conformity has been such as to entitle him to his discharge. The silence of the creditors, after notice of the pendency of the petition for a discharge, is another means. But there is not the slightest reason to suppose that the court may not resort to other sources of information known to the law, and the chief one of these is, the specifications and proofs, if any, which an opposing creditor may offer.

But why admit objections generally, and refuse to hear that founded on the failure of assets? Simply because the report of conformity in that particular has been filed. The report is doubtless correct, and correct for the reason that, when the Register makes his examination, he finds no proof of debt on his files.

If it is not intended to punish the creditor for his laches in filing and proving his claim, it is a harsh rule that would allow him to file his claim, and then deny him the fruits of that filing.

Besides, it is difficult to discover any reason for allowing objections to be made in one instance and not in the other. The creditor is not under disability by the terms of the law, and is in time, I think, at any moment before the hearing.

The bankrupt is not entitled to his discharge.

CORNELIUS K. GARRISON vs. THE CITY OF CHICAGO AND THE PEOPLE'S GAS LIGHT AND COKE COMPANY.

CIRCUIT COURT. — NORTHERN DISTRICT OF ILLINOIS. — JULY, 1877.

IN EQUITY.

1. CONTRACTS WITH MUNICIPAL CORPORATIONS. — AUTHORITY OF MUNICIPAL OFFICERS TO MAKE TIME CONTRACTS.—The city of Chicago has not the right to contract for lighting the streets and public buildings for a term of years.

2. SEMBLE.—If the other contracting party has gone to great expense in pursuance of such a contract, a strong equity may arise in his favor.

3. The officers of a municipal corporation should be held to a rigid accountability in the discharge of their duty in regard to contracts of such corporation; and in all cases of contracts to run for years, the authority to make them should be clear, because they involve pecuniary liability which will be a tax upon future property owners of the city.

This was an application for a preliminary injunction made by C. K. Garrison, a citizen of the State of New York, as a stockholder of The People's Gas Light and Coke Company, an Illinois corporation, to restrain the city of Chicago from interference with the rights of the Gas Company, under and by virtue of a certain contract entered into by the city of Chicago with said Gas Light and Coke Company, on the 3rd of October, 1869, for the supply of gas to the city for the period of ten years, for a sum not exceeding $3.00 per 1,000 cubic feet.

The bill, after setting forth the contract, and averring the expenditure of $300,000 in the construction of gas works, and $40,000 for the purpose of supplying the West Division of said city with gas as required by said contract, charged, among other things, the repudiation of the contract on the

part of the city, its refusal further to receive the gas as agreed from the company, and that the said "city will, unless "restrained by an injunction, enter into a contract for lighting "the West Division of said city and the public buildings with "oil, and discontinuing lighting the West Division of said "city by gas, and that the said city now threatens to and will, "unless restrained by injunction, enter upon and take pos- "session of all the lamp posts erected by The People's Gas "Light and Coke Company, taking therefrom the service "pipe, or a portion thereof, and wholly prevent said company "from using said lamp posts and service pipes connected "therewith for the purpose for which they were erected."

The bill prays for a temporary injunction, and "that "the court may declare said contract to be in full force and "effect, and that the damages of said company may be ascer- "tained, by reason of the wrongful acts of said city." The application was made upon bill, answer and affidavit.

Corydon Beckwith, *William C. Goudy*, and *B. F. Ayer*, for the complainant.

T. G. Frost, *Leonard Swett*, and *Elliott Anthony*, for the defendants.

For the complainant it was contended that there was a manifest and undeniable violation on the part of the city of the written contract in this case, and that heavy expenditures had been incurred by the company on the faith of the contract, that irreparable injury would be sustained by the company and its stockholders if the defendant was not restrained by injunction, as prayed for in the bill. The principal ground of defense relied on was the alleged invalidity of the contract set forth in the bill.

T. G. Frost, in opposition to the application, contended,

That the bill could not be sustained, nor the application for injunction could not be granted for the following reasons:

I. There was a complete remedy at law, if the contract on

which the complainant's rights depend is valid, and where there is an adequate remedy at law, the injured party cannot maintain a bill in equity, or be entitled to the benefit of the extraordinary writ of injunction.

Dows vs. City of Chicago, 11 Wallace, 108–112; *Ewing vs. City of St. Louis*, 5 Wallace, 413–419; *Hannewinkle vs. Georgetown*, 15 Wallace, 548.

II. A municipal corporation cannot be enjoined from the exercise of its legitimate or chartered powers where its action does not transcend said powers. If it has violated its contract, the injured party must be remitted to his action at law. He cannot, though there has been a palpable violation of the contract on the part of the corporation, on that ground alone, arrest the machinery of the city government, or impede it in the legitimate exercise of its functions.

Public policy forbids that a municipal corporation should be enjoined from the exercise of its clear, chartered powers conferred for important public purposes. *Wiggin vs. The Mayor of New York*, 9 Paige, 21, 22, 23; *State of Mississippi vs. Johnson*, 4 Wallace, 475–500; *People ex rel. vs. Bissell*, 19 Illinois, 231; *United States vs. Guthrie*, 17 Howard, 305; *Dows vs. City of Chicago*, 11 Wallace, 108–112; Dillon on Corporations, sections 58, 476, 727, 728, 729, 738, 740, and notes; *People vs. Mayor of New York*, 2 Hill, 9, 10; *Fay et al. petitioners*, 15 Pickering, 252; *People ex rel. vs. Supervisors of Queens County*, 1 Hill, 196; *Mayor of Brooklyn vs. Messerole*, 26 Wendell, 140, 141; *People ex rel. Fitnam vs. The City of Galesburg*, 48 Illinois, 485; *Dickey vs. Reed*, 78 Illinois, 261.

III. The contract set forth in the bill and relied upon as the foundation of the rights of the Gas Company, and of the complainant, as a stockholder thereof, was void, and was, therefore, incapable of enforcement, either in law or equity, upon the following grounds: *First*, Because such a contract was not authorized by any provision of the charter, and was in conflict with its general purpose and policy, and illegally suspended

the operation of the legislative and other powers of the Common Council for the period of ten years, and was contrary to public policy. 12 Abbott's Reports, 360, 378; *Presbyterian Church vs. City of New York*, 5 Cowen, 585; *Coates vs. Mayor of New York*, 7 Cowen, 585; *Milhan vs. Sharp*, 17 Barbour, 435; *Milhan vs. Sharp* (in Court of Appeals), 27 New York, 611: *State vs. Cincinnati Gas Company*, 18 Ohio State, 262, 294; Dillon on Municipal Corporations, §§ 371, 372; *Gale vs. The Village of Kalamazoo*, 23 Michigan, 344; *Butler vs. Mayor of New York*, 31 Howard's Practice Reports, 251; *Mayor and Aldermen of the City of Jackson vs. Bowman*, 39 Mississippi, 671; *Gosler vs. Corporation of Georgetown*, 6 Wheaton, 593; *East Hartford vs. Hartford Bridge Company*, 10 Howard, 535; *Davis vs. Mayor of New York*, 14 New York, 506, 532; *Richmond County Gas Light Company vs. Middletown*, 59 New York, 228, 232; 1 Dillon on Corporations, §§ 253, 254, 256, 257, 259, 296; *Thompson vs. Schemmerhorn*, 6 New York, 92; *State ex rel. vs. Cincinnati Gas Light Company*, 18 Ohio State, 290; *Illinois & St. Louis Railroad and Canal Company vs. City of St. Louis, etc.*, 2 Dillon's Circuit Court Reports, 71, 87.

Second. Said contract was prohibited by the following provision of the charter, found on page 428 of Laws and Ordinances of Chicago, being section 43 of the act of February 13, 1863, viz.: "No contract shall be hereafter made by the "Common Council, or any committee or member thereof, "and no expense shall be incurred by any of the officers or "departments of said city government, whether the object of "the expenditure shall have been ordered by the Common "Council or not, unless an appropriation shall have been pre-"viously made concerning such expense."

No such appropriation was or could have been made prior to the execution of this contract. Appropriations are made annually, and cannot be made without special authority, to cover expenses for ten successive years at one time. *Pullman vs. New York*, 49 Barbour, 57; *Landon vs. Philadel-*

phia, 60 Pennsylvania State, 464; *City of Philadelphia vs. Flanagen*, 47 Pennsylvania State, 22; *Joseph Jonas vs. City of Cincinnati*, 18 Ohio, 418; *McSpedon vs. Mayor of New York*, 7 Bosworth, 601.

Third. The contract in question made by the Mayor and Comptroller, on behalf of the city, with the Gas Company, was not warranted by the authority conferred by the resolution of the Common Council, recited in the contract, and under which it was executed, because, contrary to the proviso in said resolution, viz.: "that the price to be paid for the gas "shall not exceed three dollars per thousand cubic feet," whereas the price fixed by the contract did exceed said price authorized by the resolution by the amount of the government tax on the gas in addition. Nor was it within the power of the City Council to authorize the Mayor and Comptroller to make the contract in question, and leave the terms of the contract open to the discretion of these officers.

IV. The complainant, as a stockholder of the People's Gas Light and Coke Company, had no right to maintain this suit. Because he could only maintain such a suit where the corporation, of which he is a member, exceeded its powers, or allowed its franchises to be violated to the irreparable injury of the stockholder. Such a suit cannot be maintained merely because of the refusal of the corporation to commence a suit to enforce its rights even in a proper case. *Dodge* v. *Woolsey*, 18 Howard, 341; *Memphis City vs. Dean*, 8 Wallace, 64, 76; *Samuel vs. Holliday*, 1 Woolworth, 418.

DRUMMOND, J.—In May, 1859, the city of Chicago entered into a contract with the Chicago Gas Light and Coke Company to furnish the city with gas for ten years, viz., till May, 1869.

In February, 1855, the People's Gas Light and Coke Company was incorporated, and was authorized to manufacture and sell gas to the city of Chicago, and to erect all necessary works for that purpose.

In April, 1862, with the assent of the city, the Chicago Gas Light and Coke Company assigned all its interest in the contract of 1859, as to the West Division of the city, to the People's Gas Light and Coke Company, and from that time the latter company, until May, 1869, when the contract of 1859 expired, performed the obligations of the Chicago Gas Light and Coke Company under that contract. In 1869, then, the People's Company had the means of manufacturing gas, and was selling it to the city as the assignee of the Chicago Company.

By an amendment made in 1865 to the charter of 1855, the People's Company was authorized, with the consent of the city, to lay down all necessary gas pipes along the streets and public squares. This power seems to have been exercised by the company from 1869 to 1876, and until the controversy which has given rise to this litigation.

By its charter the city had authority to light the public streets—and, it is to be inferred, the public buildings and offices—and to levy and collect a tax for that purpose. The power to provide the necessary means for lighting the streets, buildings and offices, either by the construction of a gas manufactory or by contract, would seem to follow as of course. But it can hardly be presumed, in the absence of any restrictive legislation on the subject, that it was intended to confine the city of Chicago, as its source of supply for gas, or for light, to the People's Company or to the Chicago Company. These means were furnished, but they were not exclusive.

In 1869 the charter of the city contained a provision that no contract should be made by the city involving any expense, unless an appropriation was previously made concerning such expense. And the Comptroller was required in May of each year to submit an estimate of the amount necessary to defray the expenses of the city for the current fiscal year.

This provision of the charter does not seem to have been

construed as a prohibition to the execution of contracts extending over one year, even where the appropriation did not meet fully the expense of the contracts, and it would be difficult to maintain that this construction is unsound. The language must obviously be applied to the subject matter of the contract, as understood by the legislature, viz.: to those matters where the terms of the contract and the time of its execution were practically within the reach of an appropriation once made.

The construction of tunnels, of water works, of public buildings, including gas works, of deepening summit levels, and many other matters within the general scope of the powers of the city, may require more than a year to complete, and must necessarily involve more than one appropriation. And yet, in view of the manifest intention of the legislature, it may be doubted whether the city would be authorized to execute any of these general powers without an estimate first made of the expense to be incurred.

But if it be admitted that this is the true meaning of the prohibition, it is clear that the purpose of the legislature was to limit the City Council to the actual necessities of the particular case, and the question to be determined is whether there was a reasonable necessity on the part of the City Council to extend the contract in controversy here, and which will now be mentioned, for ten years from its date, there being no appropriation made commensurate with the obligations of the contract.

We will waive the question connected with the right of the plaintiff, a stockholder of the People's Gas Light and Coke Company, to come into this court for equitable relief, and also the other question, whether there is not a complete remedy at law for a breach of the contract, if valid, against the city, questions not free from difficulty, and come to what is the principal controversy between the parties—the contract between the city and the People's Company.

On the 5th of October, 1869, in pursuance of authority

given to that effect by the City Council, the mayor and comptroller entered into a contract with The People's Gas Light and Coke Company, by which the Gas Company agreed to supply the streets and public buildings and offices of the West Division with gas for $3 for 1,000 cubic feet, and the city agreed to take and use the same for the streets, buildings, and offices, and pay the price named. The contract was to continue in force till the 1st of April, 1879.

The contract contains other stipulations not material to this controversy. But it must be stated that the contract assumes that the Gas Company had the means of complying with its obligations. It is not the case of a contract made by the city with the company, by which the company as a consideration for making the contract with the city, was to construct and maintain gas works where there were none before. On the contrary, it is to be fairly inferred that the company had, as authorized by its charter of 1855, and its amendment of 1865, constructed gas works before October, 1869, and had the necessary appliances to execute the contract on its part. It is true, the bill alleges, and we may presume that, in consequence of the making of the contract, the company enlarged its works and made considerable expenditures; but it nowhere appears that this was a condition precedent to the execution of the contract, as that the city declared, if this shall be done, the contract shall be executed, or that the company said, if not done, then it would not be a party to the contract.

This, then, being the condition of the parties as to the subject-matter of the contract, had the city the capacity to make it? I think it had not.

It is not necessary to refer to the numerous cases cited in the argument. In my judgment, they establish by a preponderance of authority, that a municipal corporation, under the powers conferred on the city of Chicago by the legislature, and under the circumstances existing here, had no right to make a contract with the People's Gas Light and Coke Company to pay for the use of gas for so long a time.

And I think on principle the same conclusion must be reached.

The officers of the city—the members of the council—are trustees of the public. They are clothed with authority to legislate upon public interests. There can be no doubt that the right to regulate the lighting of the streets and to furnish means for the same by taxation, is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for ten years as to those matters of legislation. If it be conceded that the power existed, as claimed, then it practically follows that at the end of the term in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which, in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contracts to run for years, the authority to make them should be clear; because they involve pecuniary liability, and it is a tax upon future property owners of the city.

To sustain the contract between the city and Gas Company in this case would encourage the making of such contracts in the future. It would place it in the power of companies, whose interests were to be affected by them, to multiply them, and to continue them when the public interest demanded they should cease. To condemn it is to prevent, so far as it may tend to produce that result, the use of influences which look to private rather than to public profit. It is better that all parties should understand there is a limit to the power of municipal bodies in such cases.

I hold, therefore, as matter of strict legal right, that the contract of October 5th, 1869, was unauthorized, and the motion for an injunction against the city to prevent interferences with lamp posts, service pipes, etc., will be denied.

But the opinion of the court, even on this application,

would be incomplete without considering the case in another aspect.

It must be admitted that the claims of the Gas Company against the city seem, in some respects, to be founded in a strong equity.

The city assumed to treat with the company on the basis of right to make the contract. The latter may, therefore, be pardoned for recognizing the authority claimed. For several years the city conceded the validity of the contract by paying for the gas the stipulated price. It is only within the last few years, and after the cost of producing gas had been reduced, that any active efforts were made by the city to deny the obligations of the contract. If the cost of its production had been increased, we should probably never have been troubled with this litigation.

The company has made large expenditures for additional works. Many miles of mains and many service pipes have been put down. These have been much extended in parts of the city where there has been, up to the present time, no adequate return, owing to the sparseness of population there. It is alleged this has been done by the company at the request of the city, and that in consequence the company has been subjected to great loss caused by condensation and leakage of gas from the pipes not in use and not required for use when they were put down.

The contract, by its own limitation, expires in less than two years from the present time. In view of these circumstances it was suggested at the hearing of the motion for an injunction, that some satisfactory arrangement should be made between the parties, or by reference to others. The Gas Company has the means of supplying gas. The city needs it. It would seem as though they could deal with each other better than with any one else. If the purpose of the city was to do nothing until the validity of the contract was ascertained, that is now accomplished so far as the opinion of this court can determine it. And, therefore, as we are now only

deciding a preliminary motion in the case, it does not seem improper to renew the suggestion that was made on the hearing of the motion;—for the equity of the plaintiff appears so strong, the acquiescence of the city in the contract so long continued, that, if I could hold it binding on the city because of this acquiescence, I should feel inclined to do so, but the fact that the rights of the public cannot in any way be affected, prevents this, and nothing remains to be done in the present stage of the case but to express the wish that the suggestion of the court may be adopted by the parties.

HUGH GRAHAM vs. ELIJAH J. GAMMON *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1877.

IN EQUITY.

1. PATENT—COMPLETENESS OF DESCRIPTION.—A mere suggestion that a given result can be obtained, is not patentable, and does not anticipate a patent by another. A mechanism or design must be described by which the suggested result is obtained.

2. WANT OF NOVELTY.—A patent issued upon such a suggestion, and without proper description of mechanism or design, does not constitute a good plea of want of novelty in a valid patent.

3. The Graham device for rolling the finger beam in harvesters, sustained, and the vibratable link in the Sprague mower, held to be an infringement.

This is a bill in equity to restrain the alleged violations of a patent issued by the United States government to Alvaro B. Graham, dated February 11th, 1868, for an improvement in harvesters.

The title of the complainant to the patent is not disputed, and the proof shows that complainant is the assignee of the patentee; but the defendants deny, first, the novelty of Graham's device; and secondly, that they infringed the patent.

Ephraim Banning and *Haines & Tripp*, for complainant.

West & Bond, for defendants.

BLODGETT, J.—This patent contains eleven distinct claims, but the controversy in this case is confined to the first two claims.

The feature of the machine covered by the two claims in controversy, is the device for rocking or rolling the sickle bar—or finger beam, as it is called by the patentee.

This finger beam is so arranged that it may be rocked or tipped upward or downward so as to incline the teeth or fingers up or down, so that it may be passed over a stone or down into a hollow.

This is accomplished by joining the sickle bar, or finger beam, as it is called, to what the patentee calls a vibratable link, which is a link extending from the finger bar backward to a bracket which is fastened to the frame of the machine, so that the finger beam may be raised or lowered, and through its connection with this vibratable link it can be regulated, or tilted either up or down, the tilting being accomplished by means of the vertical arm which extends up from the vibratable link, and a lever attached to the top of the arm, reaching forward to a point convenient to the seat of the driver, so that the driver readily works or controls the rocking movement as occasion requires. The mechanism by which the rocking is produced consists of a swivel joint "M," at the point where the vibratable link is attached to the bracket, and the swivel joint "N" which connects the vibratable link with the draught rod, so that the cutting mechanism is drawn or impelled forward by this draught rod,

connected as it is by the swivel to the link, thereby permitting the motions that are required for the purpose of the action of the finger bar without interfering with the rocking or rolling motion. There are also other devices in the machine intended to raise or lower the sickle bar, but those are not in controversy. The machine which is shown in the drawings by the patentee in this case is known to farmers and manufacturers as a rear cut machine, but the patentee provides in his specifications, or suggests that the device is equally applicable to a forward cut, where the cutting apparatus is forward of the axle and wheel, and to accomplish this change he suggests that the draught rod would become a push rod, and would become subject to a pushing strain or force instead of a tensile or drawing strain.

The claims under consideration and in controversy in this case are as follows: "The combination as set forth in a harvester of the finger beam with the gearing carriage, by means of the vibratable link, and the draught rod and swivel joints, M and N, so that the finger beam may both rise and fall at either end, and rock forward or backward."

Second: "I also claim the combination as set forth in a harvester of the finger beam, gearing carriage, vibratable link, draught rod, swivel joint and arm, by which the rocking of the finger beam is controlled."

The last claim is, in one sense, a repetition of the other, that is, he claims the whole of this mechanism in combination.

The defendants insist that the idea of rocking the finger beam is old; and have put in evidence several prior patents issued by the United States to different patentees older than the patent in question, the most important of which are the Dolph patent, issued in 1857, the Zug patent, issued in 1859, the Ball patent, issued in 1859, the Bartlett and Dodge, issued in 1862, and the Wemple patent of 1867.

The defendants insist that these various patents contain the principle or idea involved in the complainant's patent, so

far as the rolling or rocking of the finger bar is concerned. It is contended, for instance, that in the model of the Zug patent, which is put in evidence, there is a provision for the rocking or rolling of the finger bar; but I must say that I can find no such feature either in the specification or model. It is true that he suggests that it may be tilted, but I think when you take his description of the construction, the only tipping he refers to is the lifting of the finger bar by means of a lever, and not the tilting or rocking motion provided for by Graham. There is a link extending back and fastened to the frame, but there is no swivel joint, and no provision for rocking or rolling the finger bar by means of a swivel joint. And even if he had a swivel joint at the point where the link is attached to the frame, the long shoe proceeding forward from the vibratable link or the connecting link, would effectually prevent or interfere with the rocking motion which the patentee, Graham, has accomplished; so that I do not find the mechanism in this patent.

The same may be said of the Ball patent. Ball has the finger beam attached firmly to the shoe. It is also steadied by a rod which reaches back to a bracket attached to the gearing carriage, and there is apparently a swivel or loose joint by which it is attached; but there is no joint forward, and no means by which the mechanism—the finger bar, as such, can be rolled or tipped in the manner provided by the Graham patent.

So, too, in the Bartlett and Dodge mechanism. We find this same long shoe extending forward with no device for rocking or rolling; and the same may be said of the Zug patent. There is no possible device in the patent for the rocking, and no device or means by which the finger beam can be rolled or tilted in the manner provided in the Graham patent.

In the Dolph patent it is equally difficult to find any mechanism which was intended to secure the peculiar motions which I find in the patent to Graham. And it may be said,

in reference to all these prior patents, that while they speak of rocking, or tilting, or tipping the finger beam, they, none of them, describe any mechanism by which it can be accomplished. It is a well settled principle of patent law, that the mere suggestion that a given result can be obtained is not patentable, and does not anticipate a patent by another, but a mechanism or device must be described by which the suggested result is attained.

The mere saying, for instance, as was done a century, or two or three centuries ago, that vessels could be propelled by steam, did not deprive Fitch or Fulton of their right to a patent on the mechanisms by which they accomplished that result. The mere idea that intelligence could be communicated by electricity, did not deprive Morse of his patent upon his mechanism. So the suggestion by these various inventors who antedated Mr. Graham in various improvements upon the harvester, that the finger beam may be tipped or may be rocked, does not deprive Graham of his right to a patent upon his mechanism by which he did so, as long as they did not show a mechanism by which they accomplished the same result.

The other patent put in evidence, and the one which to my mind comes the nearest to anticipating this plaintiff, is the patent to A. Wemple, of 1867. Mr. Wemple shows in his specifications and drawings a device by which he does produce a tilting motion of the finger beam; but his device is so different—his mechanism by which he accomplishes the result so unlike that of Graham, that I think the two patents may possibly both stand. At any rate I do not think that the device of Wemple anticipates the much more simple device of Graham. It is not necessary for me to go into an extended discussion or analysis of the peculiar mechanism by which Mr. Wemple proposed to secure this rolling or tilting motion in the finger beam. It is enough to say that I find it sufficiently different from that of Graham, to

justify my conclusion that he has not so far anticipated Graham in the art as to defeat the Graham patent.

With these views, therefore, I must hold that the defense that the complainant's patent is void for want of novelty, is not sustained. On the contrary, I think that the evidence shows Mr. Graham to be the first who has really accomplished this desirable tilting or tipping motion successfully, by the simple mechanism which he shows in his drawings and patent. The only other question left in the case then, is the question whether the machine of the defendant's infringes complainant's patent. The model of defendant's machine which is put in evidence—known as the "Sprague Mower," shows a vibratable link to which the finger bar is connected by precisely the same mechanism—that is, a swivel joint—that connects the finger bar of Graham's machine to the vibratable link. The vibratable link in the Sprague mower is not constructed precisely, so far as the shape is concerned, like the vibratable link of Graham, but it reaches back—is fastened firmly to the gearing carriage, or to a bracket which is connected with the gearing carriage by a swivel joint, and is worked by a lever—not a vertical lever, but a lever which secures the motion of tilting up and down, in the same manner as the Graham patent. It does not roll or tip so much as Graham's finger bar, but it is the same motion, although less in degree, and I am very clearly of the opinion that the device is essentially the same. It has been urged, and was very earnestly contended at the trial, that this device lacks the swivel joint M, and that it therefore does not contain all the elements of Graham's device.

Here we have a draught rod connected by a hook joint to a vibratable link, and extending forward and fastened to the frame. But it is contended that the swivel joint is not there. I must say that I think the patentee, or whoever prepared the specifications in the Graham patent is a little unfortunate in the choice of terms by which he describes his mechanism.

In one sense there is no swivel joint here in the defendants machine. That is, it is not technically a swivel joint, and especially the draught rod is not connected to the vibratable link by what is strictly called a swivel joint. It is a mere hook, but it performs all the functions of Graham's draught rod and swivel joint, and must be considered the equivalent of Graham's device in that particular. It is nothing after all but an equivalent mode of producing the same result.

There is a draught rod hooked to the vibratable link, and extending forward and passing through the gearing carriage so as to secure a steady uniform draught of the cutting apparatus in a forward direction. It is equally true that the lever by which the vibratable or tilting motion is secured, is not a vertical lever, but that makes no difference, whether the lever lies down horizontally or stands up. It performs the function or office of vibrating and tipping this finger bar. The result is precisely the same in both cases.

I am therefore of the opinion that an infringement is shown by the proof and that the patent is not void for want of novelty so far as the evidence in this case enables me to judge. The case will therefore be sent to the Master to assess the damages, unless the parties stipulate that no damages need be assessed.

CARRAHER vs. BRENNAN *et al.*

CIRCUIT COURT. — NORTHERN DISTRICT OF ILLINOIS. — JULY, 1877.

IN EQUITY.

1. CAUSES FOR REMOVAL TO FEDERAL COURT.—In the removal of a cause from a State to a Federal Court, the whole suit must be removed; a fragment of á suit cannot come to the Federal Court for trial, because a party interested in that fragment, or some single issue, is a citizen of another state from that of the plaintiff.

2. A removal of a cause from the State to the Federal Court will only be allowed when the controversy is so completely a controversy between residents or citizens of different states, that its termination will settle the whole suit.

3. It is not enough that citizens of different states are interested in the same issue or controversy, but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined; otherwise the right of removal is not given.

This was a motion to remand this suit to the Superior Court of Cook county, from whence it was removed to this court.

This suit was originally brought in the Superior Court under what is known as the "Burnt Records Act" of this state, for the purpose of perfecting and establishing title to the lands described in the bill.

The bill alleges that the complainant is the owner in fee of certain lands described in the bill, and that the defendants Brennan, Forsythe, Asahel Gage, Henry H. Gage and Portia Gage, also claim title in fee under certain deeds therein referred to.

Defendants, John Forsythe, H. H. Gage and Asahel Gage, answered the bill, and each claimed title to the land in question as against the complainant, by specific conveyances which they set up, which were in fact tax titles.

The defendant, Portia Gage, before answer, appeared and filed her petition, stating that she was a citizen of the state of New Jersey, and that the complainant is and was a citizen of the state of Illinois; and that in said suit there is a controversy which is wholly between said complainant and herself, and which can be fully determined as between them, and prayed a removal of the suit to this court. The Superior Court ordered the cause to be removed as prayed; and since such removal said Portia Gage has answered the said bill, setting up title to the land under a conveyance from Asahel Gage to herself.

James E. Munroe, for complainant.

A. N. Gage and *Beam & Cooke*, for petitione

Blodgett, J.—The statute under which this suit was brought provides, in substance, that in all counties where the records of land titles have been destroyed, the claimant or owner of lands in fee, or of any interest in them, may file a petition to establish title. The statute requires that all persons owning or claiming an estate in fee, all persons in possession, or all persons to whom the lands shall have been conveyed, and the deed of conveyance recorded after the destruction of the record, shall be made defendants to the suit; and all other persons may be made parties by the name and designation of "whom it may concern." Any person interested may come in and set up his title and have his rights to the land adjudicated the same as if he had been made a party by name; and after the court has entered a decree determining who is the owner under the pleadings and proofs, the decree is final unless appealed from within one year. On the hearing of such case the court is to determine and decree in whom the title to the land is vested, whether in the petitioner or in other parties to the suit; that is to say, the court must upon the issues made in this case, determine and decree whether the petitioner has title to the

land as against Forsythe, H. H. Gage, Asahel Gage and Portia Gage; and also whether Forsythe has title as against the petitioner or any other of the parties claiming title; and so the title of each defendant as against the petitioner, and each of the other defendants must be passed upon and determined by the court.

The second section of the act of March 3d, 1875, provides for the removal of cases from the state to the federal courts.

By the first clause the right of removal is given when the suit arises under the Constitution or laws of the United States, or treaties made under its authority, or suits in which the United States is a plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign citizens or subjects; and the second clause provides that when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the United States Court for the proper district.

The only authority for the removal of this case to the federal courts must be found in the last clause, which I have just referred to. The defendant, Portia Gage, alleges in her petition for removal, that there is a controversy in the case wholly between the complainant and herself, which is not strictly true, because the controversy is between herself and the complainant, and all the other defendants; and she does not state that all the other defendants are citizens of a different state from herself.

It was held by this court in the *City of Chicago vs. Gage*, 6 Bissell, 467, and has also been held in *Stapleton vs. Reynolds*, by Judge Swing, of the Southern Ohio district, that the whole suit must be removed; that a fragment of a suit

cannot come to this suit for trial, because a party interested in that fragment, or some single issue, is a citizen of another state from that of the plaintiff. And it seems to me that the suit must be wholly between citizens of different states as necessary and material parties in order to give the right of removal. It is not enough that citizens of different states must be interested in the same issue or question, or controversy, which arises in the course of the case; but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined, or the right of removal is not given.

Is this such a suit? There is a controversy, to be sure, between the plaintiff and Mrs. Gage, who has removed this case to this court; but the determination of that controversy will not determine the suit; the court must still determine her rights as against all the other defendants, and must also determine the title to the property as between all the other defendants, and each other as against the plaintiff.

Suppose we hold that Mrs. Gage has not title, either as against the plaintiff or either of the other defendants, the controversy in this case is not thereby determined, but we have still to settle the title as between the other parties. The scope and purpose of this act of Congress, it seems to me, must be to allow simply a removal to the federal courts when the controversy was so completely a controversy between residents or citizens of different states that the determination of that controversy settled the whole suit.

The legislature of this state, in its wisdom, has provided for the bringing of this kind of suit; it is an exceptional and an extraordinary form of action, and only arises in the case of a castastrophe like that which has happened in this county by the destruction of all its land records. Necessarily, almost, there will be parties residing in various states, who may have directly or indirectly some interest in the title which the party seeks to establish; and is this court to assume that every non-resident who happens to be brought in, or to have

an interest in a proceeding of this kind, can remove his part of that controversy to the Federal Court and have it settled there? And if he does, what is the court then to do, when it has settled the controversy as between the parties so removed—the non-resident so removed and the other claimants to the property? It seems to us that Congress could not have intended that this result should follow in this class of cases. So, too, in an infinite number of chancery suits which are brought. A party foreclosing a mortgage in the state courts finds upon the record a judgment in favor of a non-resident creditor, he makes that creditor a party; the controversy, as far as that party is concerned, is only between the judgment creditor and the mortgagee, which does not dispose of the whole case, because, after all, the main object of the suit was to foreclose the mortgage, and the controversy initiated by the suit was between the mortgagor and the mortgagee, or the holder of the mortgage. So that it seems to us that there can be no doubt but that, in these cases, where a non-resident is merely incidentally or partially interested, he cannot remove the case, and ought not to be allowed to.

This case is interesting only, because it is the first one of this character which has come before us, and we are of opinion that this case certainly does not make such a case as entitles the party to a removal.

I do not wish to be understood, however, as saying that a case may not be made that would entitle a non-resident to a removal, but what a non-resident may have such an interest as that the determination of his or her interest may determine the whole suit or controversy, in which event the right of a removal would undoubtedly exist. I only intend to say that this case is not made out, and that in a general way we do not think that a mere incidental party who is brought in to contest the title under the Burnt Records Act, is entitled to a removal because he is a non-resident.

The case will be remanded to the Superior Court.

An appeal was prayed and allowed to the Supreme Court of the United States.

As to the right of removal from the state to the federal courts, consult also: *State of Illinois vs. C. & A. R. R. Co.*, Vol. 6 of this Series, 107; *City of Chicago vs. Gage*, Id., 467; *Scott vs. C. & S. R. R. Co.*, Id., 529; *Kingsbury vs. Kingsbury*, 3 do., 60; *Gaughan vs. Northwestern Fertilizing Co.*, Id., 485; *Akerly vs. Vilas*, Id., 332; *Boggs vs. Willard*, Id., 256; *Akerly vs. Vilas*, 2 do., 110; *In re Cromie*, Id., 160; *Tracy vs. Bowen*, 1 do., 81; *Hough vs. Western Transportation Co.*, Id., 425.—[*Reporter.*

FIFTH NATIONAL BANK vs. LONG.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1877.

IN EQUITY.

1. PRACTICE.—BRINGING THE UNITED STATES INTO COURT.—The district attorney is not so far an officer of the court that the court can compel him to enter the appearance of the United States.

2. The United States can be brought into court by the entry of an order that it shall plead, etc., within a given time, and the service of a copy of such order upon the proper representatives of the Government.

Hitchcock, Dupee & Judah, for complainants.

Mark Bangs, District Attorney, for the United States.

BLODGETT, J.—The motion made in this case is that the court direct or order the district attorney to enter the appearance of the United States as one of the parties defendant.

The case is really this: the complainant files a bill to foreclose a mortgage made by Long to the complainant. It appears that the United States recovered a judgment at some

time after the mortgage in question against Long, so that the United States are judgment creditors of Long, and the complainant is anxious to foreclose the equity of redemption against the United States, as well as against Long. The motion is that the district attorney shall be required to enter the appearance of the United States.

I do not think the court has any power to enter any such order, or to entertain such a motion as that.

The district attorney is not so far the officer of the court that the court can compel him to perform an official act for the United States in reference to a matter of this kind. I think—I only make this by way of suggestion—that the court can enter the following order if the complainant wishes it; that the United States shall enter its appearance in this case, and plead, answer or demur to the bill by a given time, and direct that a copy of this order shall be served upon the district attorney, and also upon the attorney general, or some other government officer, and then if the government does not enter its appearance, it will be a question for you to determine whether you will take a default against them or not.

I should be quite inclined myself to think that if the government did not enter its appearance, and the record shall show such a service, inasmuch as the government has entered the arena as a property holder, or rather as a lien holder, that it could be treated like any other person. It is true the old English rule holds that the king cannot be sued in his own court, or the soverign cannot be sued here in its own court, and that rule is carried so far in England that the king cannot be sued for debt or for trespass, but Mr. Justice GREER, in *Elliott vs. Van Voorst*, 3 Wallace, 299, seems to think that there may be such a thing as a distinction between the United States as a sovereign in executing its prerogatives of sovereignty, and the United States as a property holder; and I am inclined to give you the rule which I have suggested, but I do not think I can enter an order that

or the district attorney shall enter the appearance of the United States.

Another suggestion has occurred to me in the matter: that is, inasmuch as this judgment appears from the record of the judgment itself—being a judgment in favor of the the United States—to have been rendered in the interest of the Internal Revenue Bureau, perhaps the order had better be served upon the the Commissioner of Internal Revenue, the attorney general, and the district attorney.

In re ROSCOE R. STEELE, *et al.*

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY, 1877.

IN BANKRUPTCY.

1. PRIORITY OF ATTACHING AND JUDGMENT CREDITORS.—Where an attachment upon property of the bankrupt for its full value is dissolved by an adjudication, a judgment creditor who has made a levy subject to such attachment is not entitled to priority as against the assignee.

2. But where a creditor has obtained a valid and effectual lien by attachment, and has prosecuted his suit to judgment, and made an execution levy. his lien under such levy is to be considered as prior in time to that of other creditors who have levied attachments intermediate the attachment and execution levy of such creditor, and is not affected by the dissolution of such attachments.

Mr. Pereles, for petitioners.

Jenkins, Elliot & Winkler, attorneys for assignee.

DYER, J.—The petitioners, S. A. Field, and Blair & Per-

sons, who are creditors of the bankrupts, apply for an order directing the assignee to pay to them the amount of certain judgments, recovered by them against the bankrupts before the bankruptcy, and upon which judgments they claim that they obtained, by virtue of execution levies, liens upon certain property. The facts necessary to consider are these:

On the 3d day of January, 1877, John Bromley and others, creditors of the bankrupts, commenced suit against their debtors in the Circuit Court of Milwaukee County, to recover the sum of three hundred and nineteen dollars and thirty-five cents and interest, and attached a certain stock of goods belonging to the bankrupts. On the same day Henry Newberger and others commenced suit by attachment in the state court against the bankrupts to recover the sum of one thousand three hundred and twenty-eight dollars and five cents and interest, and attached the same stock of goods attached in the action before named. On the same 3d day of January, the petitioner, Samuel A. Field, commenced an attachment suit against the bankrupts before a justice of the peace, to recover about the sum of two hundred dollars, and attempted to attach the same goods, subject, however, to the two attachments before mentioned, which were prior in time. On the fourth day of the same month, the petitioners, Blair & Persons, commenced an attachment suit against the bankrupts before a justice of the peace, to recover about the sum of seventy-five dollars, and attached said stock, subject to said prior attachments. On the 5th day of January, Enoch R. Artman and others, creditors of the bankrupts, commenced an attachment suit against them in the Circuit Court of Milwaukee County, to recover the sum of two thousand one hundred and ninety-two dollars and sixty-two cents and interest, and attached the same property, subject to the prior seizures.

According to an inventory and appraisal made by the officer under the first attachments, the entire stock of goods attached in all the cases was of the value of two thousand four hundred

and fifty-eight dollars and one cent. Facts disclosed by the affidavits show that, in the suit brought by the petitioner Field, no valid seizure under the attachment issued in that case was made, but on the 18th day of January, 1877, judgment was obtained for two hundred and sixteen dollars and twenty-nine cents, and execution was on the same day issued, and levy under the execution upon said stock was made, subject to the prior attachments. Judgment was also rendered January 11th, in the action commenced by the petitioners, Blair & Persons, for the sum of seventy-six dollars and fifteen cents, and execution was issued on the same day, and levy made, subject to the lien of prior attachments. There is no evidence that these judgments were obtained, or the execution levies made, by any collusion with the debtors. Judgments were never obtained in the actions commenced respectively by Bromley et al., Newberger et al., and Artman et al.; but subsequently, and within four months subsequent to the 3d day of January, when the first attachment was issued, bankruptcy proceedings were instituted against Steele & Rolf, and they were adjudged bankrupts, and an assignee was chosen. On the 8th day of February, 1877, the sheriff holding the stock of goods under the attachments and execution levies made a general surrender of possession of the goods to the assignee, excepting a certain portion set apart under the levies upon execution made in favor of petitioners, Field and Blair & Persons, and which portion, when so set apart, it would seem was left with the assignee as custodian, under an agreement that it was to be re-delivered on demand, or that the assignee would pay the amount of the executions.

Upon this state of facts, petitioners claim that they are entitled to be paid the amount of their judgments in full.

The three attachments pending at the time of the adjudication in bankruptcy were dissolved by operation of law. Inasmuch as no valid seizure under attachment was made in the action brought by the petitioner Field, he acquired no lien upon the property, until his execution levy, January 18th, if

indeed any was then acquired. The levy then made was necessarily subject to the attachments in favor of Bromley, Newberger, and Artman, which were prior in time, to say nothing of the attachment in favor of Blair & Persons. The value of the entire property attached being two thousand four hundred and fifty-eight dollars and one cent, and the demands in favor of Bromley, Newberger, and Artman, amounting in the aggregate to three thousand eight hundred and forty dollars and two cents, it appears that, at the time of the execution levy by Field, the entire value of the property was covered by demands, to secure which the three prior attachments before named were issued. In other words, all the right which the petitioner Field acquired was by a levy on property already subject to attachments to its full value. The question, then, is, did the dissolution of the prior attachments inure to the benefit of the judgment creditor, and can he be let in to claim priority as against the assignee in bankruptcy?

Upon this question the courts have not been silent; and without extended discussion it may be determined upon a brief review of the decisions.

In the case of *Julius Klancke*, 4 Bankruptcy Register, 648, the property of the bankrupt was seized upon attachment. After the levy of the attachment, judgments were obtained by other creditors and executions were issued and levied upon the property previously attached. The amount of the prior attachment exceeded the gross amount of the property; and the property having been converted into money, and bankruptcy proceedings having been commenced against the debtor, the judgment creditors applied for payment in full, claiming that the attachments having been discharged, and they having a *bona fide* levy under their executions before the filing of the petition in bankruptcy, the lien of their executions was saved, and that they were entitled to preference. Judge BENEDICT denied the application, holding that the provisions of the act for preserving existing

securities do not indicate any intention to improve the condition of any creditor or create new rights; that all the right which the judgment creditors acquired was by a levy on property already subject to an attachment to its full value, and that such a levy gave the judgment creditors no security, and did not entitle them to apply to the court for a payment of their judgments in full out of the proceeds of the estate.

The case of *Johnson, Assignee, vs. Rogers, et al.*, 15 National Bankruptcy Register, 1, was one where the bankrupts had executed a general assignment of all their property for the benefit of creditors. Subsequently certain creditors commenced actions and recovered judgments which were claimed to be liens upon real estate. Bankruptcy followed, and a contest arose between the assignee in bankruptcy and the judgment creditors respecting the validity of the liens asserted by these creditors. And although Judge WALLACE holds that, if an assignment is void as intended to hinder creditors, a creditor may obtain a lien upon the real estate by getting a judgment against the debtor, and upon the personal property by the levy of an execution thereon, and that such liens will be valid as against the assignee in bankruptcy if they are obtained before the commencement of the bankruptcy proceedings, he nevertheless lays down this proposition in his opinion: "If the assignment had been void only because contrary to the provisions of the Bankrupt Act, and the assignee in bankruptcy had obtained a decree setting it aside upon this ground, the judgments of the several creditors would not have been liens upon the real estate; as against these judgments the assignment would have been effectual to transfer the title to the original assignees. If these creditors had no liens prior to the commencement of the proceedings in bankruptcy they would acquire none thereafter, and the assignee in bankruptcy would take the property as it was at the commencement of the proceedings, for distribution to all the creditors of the bankrupt, in conformity with the terms of the Bankrupt Act."

The case of *Biesenthal et al.*, 15 Bankruptcy Register, 228, determined in the Circuit Court of the United States for the Northern District of New York, was also one of voluntary assignment of property for the benefit of creditors without preference. Afterwards, creditors recovered judgments and issued executions by virtue of which levies upon personal property were made. Subsequently, bankruptcy proceedings were commenced against the assignors, and the question was, whether the assignee in bankruptcy was entitled to the proceeds of the property to the exclusion of the execution creditors' claim of priority. The assignment made by the bankrupts was not made to hinder, delay, or defraud creditors, but was held void under the Bankrupt Law against the assignee in bankruptcy; and Judge JOHNSON holds that, upon avoidance of the assignment by the assignee in bankruptcy, judgment creditors who had levied upon the property, after the assignment and before the commencement of the proceedings in bankruptcy, have no priority over the assignee. He says: "When the assignee recovers the property, he takes it as the debtor had it at the time of the act which the assignee avoids, so far as creditors of the debtor are concerned. Avoiding the transfer in favor of the assignee in bankruptcy does not revest the property in the debtor, but vests it directly in the assignee, who takes it by virtue of the statute. The transfer by the debtor, good against him and good against his creditors, prevents any lien by subsequent judgment or execution. Upon the property so situated the statutory transfer to the assignee in bankruptcy operates directly, and cannot be subjected to the liens of intervening judgments and executions without overthrowing both the language and the policy of the Bankrupt Law in its most vital provisions."

In the case of *Badenheim et al.*, 15 Bankruptcy Register, 370, it was held that where the property of the bankrupt had been attached, and other creditors had subsequently obtained a judgment under which an execution levy of

the same property was made, and bankruptcy proceedings followed, by virtue of which the attachment was dissolved, the seizure under the attachment held the property free from the lien under the execution up to the dissolution of the attachment by the bankruptcy proceedings, so that there was no time at which the lien under the execution could attach.

While perhaps the reasoning in the last-mentioned case is liable to be questioned, the general principles laid down in the cases referred to seem to be sound. It is not to be overlooked that we are dealing with a case where the prior attachments embrace demands sufficient in amount to exhaust the entire value of the attached property. If those attachments were to stand untraversed and unaffected by the bankruptcy proceedings, the judgment creditor now claiming priority would get nothing. The attachments being dissolved as a consequence of the bankruptcy proceedings, to permit a subsequent judgment creditor to intercept the fruits of avoiding the attachments, and thus prevent equal distribution, in the language of Judge JOHNSON, "would subvert the whole laudable purpose of the Bankrupt Act so far as creditors are concerned." The analogy in this respect between the case of an attachment and that of an assignment for the benefit of creditors is apparent, and the same principles may be invoked in determining the rights of parties in both cases.

Both the assignment and the attachment are good against the debtor and against his creditors. Both are avoided only by operation of law. No more in one case than in the other where the entire property is exhausted by the attachment, or covered by the assignment, can intervening judgments and executions secure to particular creditors, liens which have priority against the assignee in bankruptcy. Attachments issued within a limited period before the commencement of bankruptcy proceedings are dissolved by the Bankrupt Law for the benefit of all creditors, and not for the benefit of a few; and it was not intended by the law to bestow upon particular

creditors new or better rights, as the result of the avoidance of such attachments.

It should be observed, that in the case of *MacDonald, Assignee, vs. Moore et al.*, 15 Bankruptcy Register, 26, Judge BLATCHFORD held that when an assignment is set aside at the suit of an assignee in bankruptcy, a creditor who levied on the property assigned, before the commencement of the proceedings in bankruptcy, and after the execution of the assignment, is entitled to priority. The ruling in this case, as will be seen, is not in accord with the other cases cited, and though the Supreme Court of the United States has strongly enunciated the principles upon which, under the Bankrupt Law, the rights of judgment creditors are to be determined,[1] it seems irreconcilable with a just administration of the law to hold that where the property of a debtor has been attached to its full value, and where a subsequent judgment creditor makes a levy upon the same property, that such creditor gets a security which, upon dissolution of the attachment by reason of bankruptcy proceedings, gives him priority.

The position of the case of the petitioners Blair & Persons is different. They made an effectual and valid levy by attachment on the 4th day of January, 1877. Their attachment was subject only to the attachments in favor of Bromley et al., and Newberger et al. The aggregate amount of the demands in those two cases was one thousand six hundred and forty-seven dollars and forty cents. This did not exhaust the full value of the attached property, but left a surplus of eight hundred and ten dollars and sixty-one cents, upon which Blair & Persons could acquire an effectual lien. Holding their attachment levy, they prosecuted their suit to judgment and made execution levy, which was in force when bankruptcy

1. *Wilson vs. City Bank*, 9 Bankruptcy Register, 97, cited by Judge BLATCHFORD.

proceedings were commenced. It is true that, intermediate their attachment and execution levy, other creditors—Artman et al.,—commenced suit by attachment against the bankrupts, and made seizure of the property, which seizure was in force at the time of the execution levy by Blair & Persons. But the right or lien acquired by Blair & Persons by virtue of their attachment was prior in time, and its priority as to the surplus of the property over and above the attachments of Bromley and Newberger continued to time of judgment, and was preserved in the execution levy. Blair & Persons were then in the position of judgment creditors, holding, at the time bankruptcy proceedings were commenced, an effectual lien by *bona fide* execution levy on property more than sufficient to pay their demand and also the demands of prior attaching creditors. The dissolution of the attachments in the then pending actions by operation of the Bankrupt Law did not improve their condition or extend their rights. They occupied the same position after the discharge of the attachments that they held before, and their lien must be recognized.

The application for payment of the judgment in favor of Field will be denied, and that in favor of Blair & Persons will be granted.

JAMES E. SECOR vs. THE TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1877.

IN EQUITY.

1. CONTEMPT—INTERFERENCE WITH PROPERTY IN HANDS OF RECEIVER.—Property held in trust by the court for the purpose of protecting it pending its foreclosure, and over which a Receiver has been appointed, is in the possession of the court, and any interference with it is punishable as a contempt.

2. INTERFERENCE BY STRIKERS.—Where a railroad is in the hands of a Receiver, and the employes of another road who have struck, or any other persons prevent the employes of the Receiver from working, they commit a contempt of court and are to be treated in as summary a manner as if the contempt were committed in the actual presence of the court.

A bill was filed in 1874, in the Circuit Court of the United States for the northern district of Illinois, for the foreclosure of a mortgage, given by the Toledo, Peoria & Warsaw Railway Company, and in January, 1875, a Receiver was appointed by the court to take charge and possession of the railway and other property of the corporation, who was required by the court to operate the road. The Receiver soon after entered upon the discharge of his duties, and has ever since, with the exception hereafter named, operated the road as the officer of the court.

During the railroad strikes, which occured during the latter part of July, the employes of the Toledo, Peoria & Warsaw Railway Company did not in any manner participate in the disturbances. They were at all times willing to perform their duty, and continued their work till prevented by force or intimidation of others not connected with the railroad.

Fearing that violence would be used to obstruct the running of trains, application was made to the court for assist-

ance to keep and retain possession of the railroad property in the hands of the Receiver, and an order was accordingly made by the court conferring the necessary authority on the Marshal to accomplish that object. Notices were conspicuously posted in Peoria, advising all parties of the fact that the railroad was in the custody of the court, and that all interferences with it by unauthorized persons would be summarily punished.

A deputy of the Marshal was sent to Peoria on the 26th of July, with instructions to carry into effect the orders of the court. On that day a mob of strikers and others, at Peoria, assembled at the depot, some with clubs, sticks and other weapons, and by threats and force took possession of the trains of the company, and arrested for a time all the operations of the road. They refused to permit the employes of the company to attend to their usual services in the conduct of trains, but on the contrary, took forcible control of them either by themselves or by intimidation of the employes of the company. Mack, one of the defendants, was particularly active in obstructing the running of the cars, and was known to be one of the principal leaders.

Several of these persons were attached, as for contempt, in interfering with the property in custody of the court, through its Receiver, and a hearing was had before the Circuit and District Judge. By common consent the witnesses for and against the alleged obstructionists, as well as themselves, were heard orally in court.

It appeared satisfactorily, as well by the proofs introduced as by the admissions of the parties, that they had all taken part more or less actively in the stoppage of trains.

Mark Bangs, United States District Attorney, for the United States.

J. N. Jewett, for the Receiver.

Michael C. Quinn, for the defendants.

DRUMMOND, J.—I think the evidence in this case leaves no doubt that all these persons participated in a common object, which was to prevent the running of the trains of the Toledo, Peoria & Warsaw Railway Company. On the evening of Wednesday, the 25th of July, there was a meeting where Mack and Ennis, two of the defendants, were present and took part, the object of which was to prevent the operation of the railroads at Peoria. That purpose seems to have been carried out on the following day; and others from some cause or other, were induced to join them in this common object. It is a little remarkable that not one of these men now before the court was actually in the employ, at the time, of any railroad company, and that but one of them seems to have ever been employed by a railroad company at Peoria. Mr. Ennis, a short time before, had been employed by the Toledo, Peoria & Warsaw Railway Company.

We all acknowledge the rights of labor. It is simply the right of the man who performs labor to obtain the best price he can from his employer, and not to dictate terms to the employer. The rights of labor result from an agreement made among men, not by an order, or a dictation from one man to another. The rights of labor as thus understood, we all admit, and it is not improper perhaps, to call those rights sacred. But when it is claimed that the right of labor consists in not only refusing to labor, but in interfering with the labor of others we, of course, can have no feeling of respect for any such right as that. It is unlawful; it is criminal; it affects all the relations of life, and strikes at the root of everything in which the right of labor consists. I suppose that it was under the claim of protecting the rights of labor that these men interfered with the right to labor of the employes of the Toledo, Peoria & Warsaw Railway Company.

This was the pretext. But how absurd and unreasonable it was, we all must now acknowledge. It is impossible for the court to lose sight of the consequences of the acts of these

defendants. It was not interference merely with private property, held by an individual, which had simply a private object to accomplish, but it was interference with property which had a public object to accomplish. It was employed in transporting property, persons, and the United States mail. It was at once a means of communicating intelligence and carrying on the business of the country. These railroads are among the principal means of modern civilization by which the business of a country is transacted. Therefore when a man interferes with a property whose object is so important, which affects so materially all the relations of society, he commits as great an offense against the rights of individuals and against the rights of the public, as can well be imagined.

It is impossible to estimate the damage which has been done to this country within the last ten or fifteen days by just such acts as these defendants have performed.

We have to consider further that these defendants have interfered with a property held in trust by this court, for its protection while a proceeding by foreclosure was going on for the purpose of enabling those who have a right to the property to obtain it by purchase by decree of this court. While thus in possession of the court, it is like public property, and the court can allow no interference whatever with it from any foreign source. The Receiver who holds it is the officer of the court, and can do nothing with it without sanction of the court.

And then, in relation to the transportation of the mails by means of railroads: it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that that the mail car can only go in such a way as to enable the railroad to transport the mail, when there are other cars accompaning it.

It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss. So that, while nominally they permitted the

mail car to go, they really, by preventing the transit of other passenger cars, interfered with the transportation of the mail.

It is not usual in cases of this kind for a court, even though it is clear that there has been an unwarrantable interference with the property held by it, to impose very severe penalties, provided the parties manifest regret and repentence for what has been done. It is to be presumed that all these parties who participated in this act of violence do now regret what they have done. But in one sense every offender regrets after he has committed an offense, and particularly if he sees that punishment or penalty will follow. These men all knew that they were doing wrong. It is not possible, if they possessed ordinary intelligence, that they did not know that they were violating the law; that the tendency of what they did was to interfere with all the business of the country and do incalculable injury to the whole community.

What I wish to impress particularly upon them is, that it is incomprehensible to every man of any intelligence, any man who can sympathize even with what are sometimes called the wrongs of labor, that there can be any pretense of right in preventing other men from labor. As I said before, it is an absurdity to say that you can protect the rights of labor by trampling upon the rights of labor. All these men were willing to work for this railroad. They were willing to run these trains. They were prevented from running them by these defendants and men who acted in co-operation with them.

We all admit what is called the hardness of the times. We know that the business of the country has been disturbed; that for men who are willing to labor, it is difficult at all times to find an opportunity to labor, or to get such compensation for their labor as they desire. But when we hear of the compensation which is actually given to many of the employes of our railroads, we certainly must be somewhat surprised at the dissatisfaction which is shown by so

many of them. I venture to say that a majority of the people of this country live and support their families on much less than is given to many of the employes of the railroads. It would be well to call to mind how many of the people of this country live on $400, $500, $600, or $700 a year, and support their families.

While we admit, therefore, that there may be some reason for dissatisfaction, still there are two sides to every question of this sort, and it is one of those questions that must be settled by a common agreement between the employer and the employed—by the demand and supply of labor.

And this must be borne in mind, that we cannot change the nature of man. We cannot change his capacity and habits. We cannot make all men alike. Superiority of talents, of skill, of industry, of capacity for business, will always have its influence. It cannot be expected, therefore, that even all those men who will labor, are able to, or will, obtain the same price. There must be differences. Different kinds of labor receive different kinds of compensation. It is not possible that brakemen or switchmen can obtain as much as the superintendent. But it is one of the glories of our common country that every man, if he will only exercise the talents and the industry which he possesses, has the opportunity for rising as high as his talents, his industry and his capacity for business will enable him.

We have the custody and control of this property. It is seldom that it has been necessary for a court to interfere by the infliction of punishment upon those who have unlawfully and wrongfully obstructed the operations of a railroad, or, indeed, of any property which is in the hands of the court. In punishing these defendants we simply discharge a public duty. A public example must be made, and it must be made emphatically, from the nature of the offense which these defendants have committed—the interference with the whole public business of the country. In this circuit there is a large number of railroads in the control of the court. Any inter-

ference with the running of those roads, any obstruction to a train interrupts the business of the whole Northwestern country; prevents men from communicating with each other. It prevents merchandise from passing from point to point. It is, therefore, indispensably necessary that the court should not tolerate any interference, however slight, with the management of railroads thus in its custody. As the same time the court does not lose sight of the tempest of folly, and passion, and crime—because we must characterize it as crime; the law so regards it—which has swept over the country; we are not insensible to the influence which that may have over unthinking men.

But this thing must be stopped, and, so far as this court has the power to do it, it shall be stopped. We feel, both of us, that we would be wanting in the duty which we owe to the public and to the ultimate owners of the property which we have thus in possession, if we did not visit with severe punishment those who interfered with it. A fine imposed upon these men would really be no punishment, for I suppose most of them, perhaps all them, are unable to pay a fine. The only punishment that we can impose upon them is imprisonment. That is something they can feel and understand, and that, although not usual in cases of this kind, still, owing to the considerations that I have already mentioned, we feel that we must inflict upon these defendants. There is a difference among them. Mack, one of them, seems to have been the principal leader, and he looks as though he might be the leader in such a mob. He seems to have assumed his natural position. He therefore was pre-eminently guilty of the offense of which all are guilty. Ennis, who perhaps committed an overt act, more criminal, in one sense, than any of the rest of these defendants—namely: by drawing a weapon and threatening to shoot an engineer—seems to be a man who is in the habit of drinking too much, and was under the influence of liquor at the time, so as to affect his reason. But

for that, he perhaps would have been equally guilty with Mack.

The defendant Mack will be imprisoned in the jail of the county for four months, and the others for two months, subject to the further order of the court.

Upon a further hearing of the case, August 29th, 1877, the court gave the following opinion.

DRUMMOND, J.—The defendants were brought before the court some time since, for being engaged with others at Peoria, on the 26th of July last, in forcibly stopping the trains of the Toledo, Peoria & Warsaw Railway Company, then in the possession of a Receiver appointed by the court, and for preventing by intimidation and violence, the employes of the company from performing their duties in the running of the trains. They were found guilty of the offense, and a penalty imposed by the court.

The order of the court, appointing the Receiver and putting him in possession of the railway and its appendages, required him to operate the road; indeed, he was appointed Receiver for that special purpose among others; and the possession was exclusive in its nature—that is, it in effect prohibited any disturbance of the possession by unauthorized persons, so that the order of the court placed the railway in the possession of the Receiver more effectually, if possible, under its safeguard and protection than personal property in the hands of the Marshal, held by virtue of an ordinary process, which requires him to do some specific act in relation to it. This is not usually ordered directly by the court, but is issued by the clerk at the instance of counsel, or of the party, and the court or the judge may in fact have no knowledge of its existence. But it is issued under the seal of the court and by its authority, and when the officer holds property under it, the process is a protection, both to him and to the property,

Where property is delivered to a Receiver, the authority of the court is directly impressed on it by its order or decree, entered of record, which is considered notice to all persons that it is in custody of the court through its Receiver. The Marshal, under ordinary process, holds the property for a limited time, subject to the requisition of the writ. The Receiver holds it under a continuing order, which remains in force till rescinded or modified by the court.

The possession by a Receiver of a railroad is not like the ordinary case of his possession of an estate or of a house to collect rents. The obligation cast on the Receiver by the decree of the court is personal, and demands the continued, hourly control of the rolling stock by him, and therefore it is that any forcible deprivation, even for a time, arrests the order of the court by taking from him the means of compliance. The property being thus in possession of the court, it becomes its duty to protect the Receiver in its use by all the means in its power, and if he is deprived of it, to restore it to him by the necessary orders or writs of assistance to the Marshal. And if that is unavailing, it can call on the general government to aid in enforcing its lawful process or orders. And among the means at the disposal of the court are summary proceedings against persons who unwarrantably interfere with property in its custody in disobedience of its orders.

Therefore, it is, that it has been considered by all the authorities, the Supreme Court of the United States among others, that any wrongful disturbance of the possession of property held by a Receiver, is a contempt of the authority of the court, and punishable as such. So rigid is the rule that the court will not tolerate a seizure of the property by the process of another court, even though it may appear the party seeking it may have the right to it. Any one having a claim on it must make it in the court that holds the property, or obtain its authority to sue elsewhere.

The right of a court to punish summarily by fine or im-

prisonment for contempt of its authority, is undoubtedly a power requiring great caution in its exercise, but it has always been considered, that in some form and with some limitations it ought to exist. The court must have the means without delay to protect itself, its process and the property in its custody by punishing those who wrongfully and forcibly disturb the possession held under its authority. Something must be left to the discretion of the court. It must be a legal discretion uninfluenced by passion or feeling. The object must be to maintain its authority for the present, and in the future—not merely to punish. When this is attained, penalty should cease. The court should decide it as free from personal feeling as though it were a mere question of property between parties litigant.

Under our federal judicial system the power of the court to punish for contempt is limited to the misbehavior of any person in its presence or so near as to obstruct the administration of justice; the misbehavior of its officers in their official acts, and the disobedience or resistance by any person to any lawful writ, process, order, rule, decree or command of the court.

In addition to the order of the court placing the railway in possession of the Receiver, there was on the 26th of July a special order of the court requiring the Marshal to prevent any interference with it and to assist the Receiver in retaining it, and restore it if he were deprived of the possession. But if the Marshal in restoring the property to the Receiver, took possession of it, he, like the Receiver, would hold it under the authority of the court, the difference being in the one case, as in the ordinary writ of assistance, it would be held by the Marshal to be delivered to the Receiver, and in the other by the Receiver to execute the orders of the court, prescribing his duties pending the litigation—each being the officer of the court subject to the performance of his own special functions.

Such has been the embarrassed condition of the railroads in this part of the country within a few years past, that many

of them are in the possession of the Circuit Court of the United States for this circuit, the gross annual earnings of which amount to more than fifteen millions of dollars. This statement shows the magnitude of the interests intrusted to our care. The theory is that our possession is only temporary, but there is generally such a multitude of claims to be adjudged in each case, and so great are the difficulties in arranging conflicting rights among the mortgagees preparatory to a sale and reorganization, that it sometimes happens in spite of the earnest efforts of the court to hasten the sale by foreclosure, that they remain in the custody of the court for some years. The Toledo, Peoria & Warsaw Railway Company has been in the hands of a Receiver for more than two years.

It will be seen, therefore, that the forcible interruption of the traffic of so many railroads for days, was a very serious matter, and the judges were of opinion, after the fact, that it was not possible to pass by so great an outrage upon the rights of property in our possession, by a reprimand or mere nominal punishment of the guilty persons. If it had been a few cars or engines that had been interfered with, it would have been different, but there was the business of many railroads, for a time struck down by men who bade defiance to the law and to the authority of the court. There seemed to be a necessity to exercise the power vested in the court. If such things could be repeated, then was not only a great wrong done to those whose interests we were obliged to protect, but the government itself had ceased to accomplish one of the chief objects of its creation.

We could take no part in any supposed conflict between capital and labor, if there can be a conflict in a country where the laborer of to-day may be the capitalist of to-morrow. All men are equal before the law. Neither the capitalist nor the laborer has a right to violate it. We personally desire that the laborer in all departments of life should obtain adequate reward for his services. What that should be, it was not for

us as a general question to decide. We can only say that we found no sufficient excuse for the wrong done to the property in possession of the court. The men who committed it had no claim whatever to it, and if they had, the result would have been the same. Those who may be said, in one sense, to own the property of the Toledo, Peoria & Warsaw Railway Company, and who will be entitled to its proceeds when sold, are the bondholders under the mortgages, but though many of them may be capitalists, still even they would be guilty of a contempt if they violently took possession of the property while in the custody of the court. It is the act committed that constitutes the offense, whether by capitalists or strikers, the forcible seizure of property not in the possession of an individual or of a corporation, but of the court.

But while these circumstances have influenced us to impose a penalty, we do not desire to continue it, if the purpose has been effected—the maintenance of the authority of the court and the prevention of similar offenses hereafter. And after due consideration we have come to the conclusion, the court still being in session, that we may remit the penalty and discharge the defendants.

The railroads have resumed their ordinary traffic. There seems at present no danger of future trouble. Railroad employes have returned to their duties. It is to be hoped that the lessons of the time have not been lost on the public, nor on employers or employes. The defendants have expressed regret for what has been done, and promise that the offense shall not be repeated. And then it is to be remembered that we consider only the disobedience of the orders of the court and not the general criminal act. And though the wrong done was great, still it is but justice to say that at Peoria, as elsewhere in this circuit, there was no destruction of property as at Pittsburgh; on the contrary, there were in some places earnest efforts made by the strikers to preserve property.

Again, we do not lose sight of the fact that at Peoria, as elsewhere in the circuit, persons who aided in depriving the

Receiver of control over the property, did not fully realize the nature of the offense as against the court. They must to a great extent be held answerable for all the consequences which followed from their wrongful and violent acts, but it must be admitted that after a time, when they fully comprehended that they were obstructing the orders of the courts and the possible results, they relinquished the control of the trains and allowed the Receiver to retake possession. In Peoria this was sooner accomplished than in some other places. So, that in view of these considerations, and with the concurrence of the district attorney and the counsel of the Receiver, all the defendants will now be discharged, on each one giving his own recognizance to observe the laws of the United States, and to abstain from all wrongful interference with any property in the possession of a Receiver of this court, for one year from this time.

See also *King vs. The Ohio & Mississippi Railway Co.*, post p.

The authorities on the subject of contempt of court by interfering with property in the hands of a Receiver can be found in 2 Daniel's Chancery Practice, 1743, and in High on Receivers, sections 163-174.—*Reporter.*

In re ASA W. BURROWS.

DISTRICT COURT.—DISTRICT OF INDIANA.—AUGUST, 1877.

IN BANKRUPTCY.

1. FRAUDULENT CHATTEL MORTGAGE.—A chattel mortgage given to secure a debt and also covering other property, which is used by the mortgagor as his own and for his own benefit, is fraudulent against creditors, and the instrument is void.

2. A mortgage given in part to defraud creditors is void altogether.

On the 9th of March, 1876, Asa W. Burrows, a confectioner, executed a chattel mortgage on his stock in trade, fixtures, furniture, and untensils, to secure to William T. Gibson the payment of certain promissory notes. On the 28th of February, 1876, the Ætna Iusurance Company brought suit in the Circuit Court of the United States for this district, against Burrows, to recover possession of certain premises, and for unpaid rent; and on the 25th of March the insurance company obtained judgment for possession of the premises, and $700 for their use and occupation. On the 28th of March, an execution was issued and placed in the hands of the Marshal, and on the 30th was levied on the stock then on hand, and the fixtures, furniture, and utensils described in the mortgage.

On the 10th of April Burrows was adjudged a bankrupt on his own petition. Afterwards, by agreement of Gibson and the insurance company, the property in dispute was delivered to Burrows' assignee to be sold, whatever liens said claimants had being transferred to the fund to be derived from said sale. The assignee sold the property for $1,000, subject to a mortgage held by the purchaser. Both Gibson and the insurance company claim this sum; the former by virtue of

the lien of his mortgage, the latter by virtue of the lien of its execution and levy.

Porter, Fishback & Porter, for insurance company.

Chapman & Hammond, for mortgagee.

GRESHAM, J.—The insurance company insists that, although on its face there was no objection to the mortgage, yet it was void, because there was a verbal agreement between Gibson and Burrows that the latter should continue his business just as he had done before, disposing of the mortgaged property for his own benefit. This was denied by Gibson, and the special master to whom this question of fact was referred, reported that the mortgaged property consisted of the stock, fixtures, furniture, etc., of Burrows' confectionery store; that with the knowledge and consent of Gibson, Burrows continued his business, just as it had been carried on before the execution of the mortgage, using the proceeds of the sales as his own, and that this agreement extended to the stock on hand only, and not to the fixtures, furniture, utensils, or any other property described in the mortgage. The master further reported that the value of the stock on hand at the time the mortgage was executed, compared with the fixtures, furniture, etc., was small, but what the proportion was he did not find.

It is insisted by the insurance company that the agreement that Burrows should continue to carry on the business, buying and selling in the usual way, and using the proceeds of the stock as his own, rendered the entire mortgage void; while, on the other hand, it is contended by Gibson that the agreement vitiated the mortgage so far only as the stock on hand was concerned.

A creditor has a right to take a mortgage from his debtor, if he can get it, to secure his own debt. More than that he is not allowed to do. If the mortgagee, not satisfied with getting security for his own debt, goes farther and agrees that the mortgage shall cover certain other property, which shall

be used by the mortgagor as his own and for his own benefit, a fraud is committed against other creditors, and the entire instrument is void. Such an agreement necessarily hinders and delays other creditors. It will not do for the mortgagee in this case to say that so far as the fixtures, furniture and utensils were concerned, there was no evidence of an intent that they should be protected by the mortgage for the benefit of the mortgagor. It is enough that the object of the parties in part was to do what amounts to a fraud on other creditors. That unlawful design, confined as it was to only part of the property, was sufficient to render the mortgage void in its entire extent. Entire good faith is necessary to uphold such instruments, and it cannot be said the parties have dealt fairly, when their design, as to part of the property described in the mortgage, was to protect it in the hands of the mortgagor from levy and sale by other creditors. [1]

It is therefore ordered that the fund be applied to the payment of the execution of the Ætna Insurance Company, and an order will be made for payment of costs by Gibson.

As to invalid and fraudulent chattel mortgages consult also: *In re Forbes*, Vol. 5 of this series, 510; *Moore vs. Young*, 4 do., 128; *In re E. R. Stephens*, 3 do., 187; *In re Eldridge*, 3 do., 362; *Harvey, Assignee, etc., vs. Crane*, 2 do., 496; *Bowen vs. Clark*, 1 do., 128.—[*Reporter.*

1. *Russel vs. Winne*, 37 New York, 591. Thomas on Mortgages, 427.

JOHN KING, JR., *et al.* vs. THE OHIO & MISSISSIPPI RAILWAY COMPANY,—
ALSO THREE OTHER CASES.

CIRCUIT COURT.—DISTRICT OF INDIANA.—AUGUST, 1877.

1. CONTEMPTS—INTERFERENCE WITH PROPERTY IN CUSTODY OF A RECEIVER.—A Receiver being an officer of the court, whose duty it is to protect the property and operate the roads under the direction and order of the court, the property thus placed in his possession is considered as property belonging to the court, and entitled to its protection.

2. SUMMARY PUNISHMENT OF RIOTERS.—In proceedings for a contempt, the court can proceed in a summary manner, and the accused is not, of right, entitled to a trial by jury.

3. Where the offense is clearly proved the court will proceed summarily to punish an offender.

4. Interference with the running of railroad trains is an offense public in its character.

The Ohio & Mississippi Railway Company; The Indianapolis, Bloomington & Western Railway Company; The Indianapolis, Cincinnati & Lafayette Railway Company; The Logansport, Crawfordsville & Southwestern Railway Company were, in the month of July, 1877, in proceedings of foreclosure of mortgages against them respectively, in the possession of Receivers acting under the authority of the court, and required to operate the railways. During the strikes of the latter part of July, the trains of these various railways ceased for a time to run—a mob of strikers and others combining to stop them by force—of the Ohio & Mississippi Railway Company at Vincennes, of the Logansport, Crawfordsville & Southwestern Railway at Terre Haute, and of the two others at Indianapolis.

The court, on information of the facts, issued orders to the Marshal, in aid of the Receivers, requiring him to prevent all

disturbance of their possession, and to use his authority, as Marshal, under the law, to enable them to operate the roads, and due notice was given at Vincennes, Terre Haute and Indianapolis, of the fact that these railways were in the custody of the court, and that there must be no interference with the possession.

Several persons were, on complaint duly made, attached as for contempt of the authority of the court, and disobedience of its orders at Vincennes, Terre Haute, and at Indianapolis, and a hearing took place before the circuit and district judges.

By agreement, the witnesses as to the facts, and the defendants, were heard orally in court. Some of the defendants admitted the offense, but the court heard the facts, whether in aggravation or mitigation.

The facts occurring at each place were substantially the same: a crowd or mob of strikers and others assembled at the depot, took possession, and during a part of the week of 22d–28th of July last, by force or intimidation arrested the running of trains. The employes of the Receiver were by force or threats interrupted in the discharge of their duty. At Indianapolis, this was done by persons not connected with either of these roads there operated by Receivers. There seemed to be some sort of order in their lawlessness. There was no direct damage done to property, but traffic was suspended for some days, the freight trains entirely, and the passenger trains more or less. They seemed willing to allow the postal cars to proceed, and they went on, with more or less interruption. The mob, headed by a committee, of which many of the defendants were members, assumed and held absolute control for a time over engines, cars and depots, and issued their orders whether passengers should be suffered to proceed (at times making an exception in favor of women and children), and whether there should be express matter, passengers or freight trains sent; in short they used the property as their own. Switchmen became general freight

agents, firemen managers, and brakemen superintendents. After several efforts of the Marshal at Indianapolis, the strikers surrendered the trains to the Receivers, and they were run as usual. At Vincennes and at Terre Haute the trains were not regularly resumed till just before or at the time the United States troops appeared to enforce the authority of the court.

It appeared by the testimony of witnesses, and the admissions of the defendants, that they all, except Reeves and Sayre, had been more or less active in taking the property from the control of the receivers.

By the Judiciary Act of 1789, the courts of the United States had the power to punish by fine or imprisonment, at the discretion of the court, all contempts of their authority in certain cases. This was modified in 1831,[1] and the contempts for which persons are punishable, were restricted to the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, to the misbehavior of any of the officers of the courts in their official transactions, and to the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts.

Nelson Trusler, for United States.

Benj. Harrison and *C. A. Beecher*, for Receiver Ohio & Mississippi Railway.

J. W. Gordon and *Mr. C. W. Fairbanks*, for Receiver Indianapolis, Bloomington & Western Railway.

A. W. Hendricks, for Receiver Indianapolis, Cincinnati & Lafayette Railway.

[1] Section 725, Revised Statutes of United States.

Charles M. Osborne, for Receiver Logansport, Crawfordsville & Southwestern Railway.

A. G. Porter, *William Herod*, and *Ferd. Winter*, for defendants.

DRUMMOND, J.—We have spent several days in examining the testimony concerning the interference by parties who have been brought before the court with the property in its custody. Four railroads, under the orders of the court, were placed in the possession of Receivers. They became officers of the court, whose duty it was to protect the property and operate the roads under the direction and order of the court. The property thus placed in their possession is considered as property belonging to the court, and of course entitled to its protection by all the means which are at the disposal of the court; and the court, being a national court, has a right to call upon the nation, as such, to enforce its orders.

The court is the trustee of the property for the purpose, while foreclosure suits are pending affecting it, by which it is to be sold and turned over to those who are legally entitled to it. While it is thus temporarily in possession of the court, the court would fail of its duty which it owes to the ultimate owners of the property, and which it owes to the nation as such—if it were wanting in any respect in the use of those means which it had the right to employ for its protection.

I hardly think the testimony in the case of Mr. Sayre is sufficient to warrant the court in punishing him for contempt. It will be recollected that we proceed in a summary manner. The party is not, of right, entitled to a trial by jury. He is charged with an offense against the court. Wherever such an offense is committed, it may become the duty of the court to punish the party thus guilty, but the court never will in a doubtful case, in this summary way punish any person. It must always be a case free from doubt; where the overt act is

clearly and distinctly proved. In this case it is quite clear that there was a certain understanding between Mr. Sayre and many—perhaps a large number of the strikers—that he sympathized with them in the object which they had in view; that he was willing to aid and co-operate with them to a certain extent; but whether or not he desired to go so far as directly to interfere with the operation of any of the railroads, and particularly with the railroads within the control of this court, does not clearly appear. He is therefore entitled to the benefit of the doubt which exists in the case. It is manifest, however, that while the proof is not so distinct upon the point as to justify the court in punishing him, that he was not doing his duty in the premises, considering his position as secretary of the society to which he belonged, many of whose members were undoubtedly engaged in this strike, and perhaps some of them in interference with the property in the custody of the court. What took place in the street when citizens were passing and he stopped them, and when he showed a peculiar favor to the strikers, is a most suspicious circumstance, and there are many other circumstances of a suspicious character developed in the evidence; but still he may have the right to say that his only connection with the strikers was to go so far as to cause the men to cease from work, and not to interfere directly with the running of trains, the latter of which and consequent disobedience of the orders of the court, is the only offense of which we can take cognizance.

It may be a question whether or not a court, under circumstances like those in which this court is placed, would have the right to punish a man as for a contempt who was interfering with those who were in the employ of a railroad, and trying to dissuade them from the performance of their duty, but that ground is so doubtful, even if it were established, that Sayre did thus interfere, and did thus persuade the men to abandon their duty by leaving their trains, that we do not choose to occupy it, so that on the whole, Sayre will be discharged; but there are so many suspicious facts the

court will require him to enter into a recognizance for his good behavior, and to secure his non-interference with any property of the court for twelve months to come.

It may be that the other defendants had some grievances against their employers. That is a question into which we need not enter. In the present aspect of the case, I can only say this: That these Receivers, being the officers of the court, if any wrong were done by them to any of the employes of the road, the court is always open to hear those grievances, consider them and instruct the Receiver to do complete justice to all the employes. So far in relation to the employes of the roads that are thus in the possession of the court: As to the employes of other railroads with which this court has no concern, of course, we cannot interfere. But, admitting that these defendants had grievances against the railroads, how are they to be redressed or removed? That is a very serious question. Are they to be removed by force, by violating the laws of the country, by interfering with so many of its business relations as must necessarily follow any obstruction of the operations of the roads? Is this the way in which grievances are to be redressed? Are we not all citizens of a common country? Do we not all desire to stand by the law? Is not the law ample to protect the rights of all?

These defendants, under the belief that wrongs had been done to them by the railroad officials, entered into a combination to right these wrongs, real or imaginary, by stopping the trains. That this was a great wrong will appear when we apply such a principle to any of the business relations of life. Suppose the employes of the various departments of business in this city should think that their employers did not pay them adequate wages, and should combine together, and require all persons thus employed to cease their employment, and so put a stop to all departments of business, to the stores, to the manufactories, to everything of that kind. Would that be right? Would it not be a great wrong for persons thus to do? Suppose in seed time the farm hands

throughout a large section of this state should come to the conclusion that the farmers did not pay them wages enough, and should combine together and go around to the various farms and require the hands to strike, and prevent in this way the planting of the seed? Suppose during harvest they should do the same thing—and prevent the farmers from harvesting their grain, corn or products of the soil? Would that be right? Would not it be a great wrong? And yet that would be the same thing in principle, as these railroad employes have done in this case, and throughout the country within the last two weeks.

It is not in this way that in the various relations of life any of the different classes of the community can have their wrongs righted.

If I understand the object of these strikes it was to compel the railroad officials, by force, namely, by suspending the operations of the trains, to pay them those prices that the strikers thought they were entitled to receive. If there is anything that is an axiom, a truth universally admitted to be correct, it is this: that we cannot by law fix the price of a bushel of wheat, or a barrel of flour, or of a piece of domestic, or of a horse, or of any such thing. These are to be regulated by the supply and demand, by the wants of the community. It is very much so with labor. We cannot say by law that the laborer shall have just such a price for his services. We cannot say by law that a fireman, or a switchman, or a conductor, shall have such a price, and so on. Throughout all the various classes of railroad employes those are matters to be regulated by the necessity for the labor. It is so with everything: and so every class of the community must receive compensation for services performed, whether it be railroad men, clerks, superintendents, lawyers, doctors, merchants, or whatever they may be. Whether performed or for how much must be settled by the parties themselves. In the case of labor, between the man who seeks the employment of a man who wants to employ him, it is a matter of agreement,

and must always be. Therefore, it may as well be impressed upon these defendants, as upon all other persons, that it is not possible that they can say precisely how much they shall have for the service they perform; they have no right to dictate to their employers what they shall receive, nor has the employer any right to dictate to them what he shall give. It is a matter of common bargain and agreement, and unless it can be settled in this way we have to destroy all the relations of life.

You cannot go into the store of a merchant in this city and say, I will give you such a price for an article, and leave the money and remove it from the store. No; the owner of the article has a right to say what he will take for it, as well as the purchaser what he will give, and unless they agree the article must remain there.

When these railroad employes sought in this way to force those who employed them to pay a particular price, they were guilty of a wrongful act. Undoubtedly, they, as well as others, cannot be obliged to perform a service without their consent. If their employers do not give them as much as their services are worth, they have a right to leave and seek employment elsewhere. Let me impress upon the defendants this truth, that even many of those who may sympathize with you—and we all do in some respects—and encourage you even in what you have done, if you went to them and sought employment, they would not employ you if they thought they could have the service performed as well at a less rate. All men are alike about this; there is no difference, and cannot possibly be any difference among men on that subject. We all seek that which we desire at as cheap a rate as we can obtain it, and you yourselves, when you go to buy anything, buy it as cheap as you can. This is the universal law of society, and it is an axiom in political economy. And yet there are reciprocal obligations between employer and employe. The one should desire to give adequate reward for labor, skill or intelligence, the other

only to receive what reward the business will allow to be paid.

This being so, the proper way, as it seems to the court, for any class who desire to have the service which they may perform, compensated at a better rate, is to spread the facts touching that service before the community and thus create a public sentiment in their favor, so that justice may ultimately be done to them by their employers. Rely upon it, this is the safest and best, and above all, this is the legal way in which to obtain a remedy for any wrong that is committed.

I can have no doubt from the evidence in this case that all these other defendants now before the court have participated in a common object, namely, to cause higher wages to be paid to them by stopping the trains from the running of which alone any wages could be paid; in other words, they thus desire to compel their employers to pay them higher wages.

Every man, as I have stated, has a right to leave the service of his employer if he is not satisfied with the wages he gets, but men ought not to combine together and cause at once a strike among all railroad employes, so as to prevent the running of trains, because the injury there is public in its character; it affects the whole country, as it were, and not a particular community or a particular neighborhood, and in several states it is made a public offense.

It may be that when this combination was made originally, the object was simply to suspend work on the road, but there was a most significant remark made by one of "the committee" at Terre Haute—Mr. Nesbit—to Mr. Claybrooke, the Receiver of the Logansport Railroad, which I wish to use, and I wish I could re-echo it throughout the whole country, to every man who has any property or any interest which he desires to protect against wrong or violence; it is this: "There is an element in that crowd which I cannot control." There was an element there that was stronger than the committee; that is or may always be so. It is not possible always when you raise a mob or crowd, to violate the law, to tell

where the operations of the mob will cease; and how far that violence will extend. They having thus raised the lawless spirit, it escapes beyond their control. No man can tell when his property may be safe. So true is it that there never should be any violation of law, and every citizen owes it to himself, to his country, and to any interest which he has in it, to stand by the law and never to violate it.

There was, as well at Vincennes and Indianapolis as at Terre Haute, a distinct understanding between these various persons who originated this strike, and who carried it on to accomplish an object in a particular way. Whether that was the purpose in the beginning is not, perhaps, clear, but that the purpose existed in the end there can be no doubt, and as there can be no controversy as to the Vincinnes and Indianapolis cases, it is sufficient to say as to the Terre Haute case that when Mr. Claybrooke informed the parties that the property was in possession of the court, they refused to restore it to the Receiver, but still wrongfully retained it.

There is no escape, therefore, from this position, notwithstanding that after a time the strikers at Terre Haute were willing that the Logansport road should run; that they seized and obstructed the running of the road in the earlier stages of the proceedings, and therefore were guilty of a violation of the law and of interference with the property of the court. If the court had any doubt in any of these cases as to the direct interference of these defendants, the court would not punish; but there can be no doubt, fairly and candidly considering the evidence, that all of the other defendants now before the court did illegally participate in the act of obstructing the trains in the control of the Receivers, and so were guilty of disobedience of the orders of this court. But as I have said, this proceeding is summary, and therefore the court is always inclined in cases of this sort, to mild, rather than harsh judgment upon the parties. If the court had jurisdiction of the general offense which was committed, and you were on trial before this court for that, the punishment

would be greater than it will be in this particular case, because, I repeat, it is a very great offense against society, and against the interest and prosperity of the country that has been committed.

Suppose that upon any of these trains there was money or property which was to save a man's farm or house from loss or sacrifice. Suppose that there was a traveler who was going to the bedside of a dying wife, husband, son or daughter. You see how you may have interfered with everything that we hold most precious as citizens of this country; and the mails, the mode of communication, you arrested even them, because you arrested the trains by which they were carried.

It is almost impossible to conceive of the infinite injury which may attend the stoppage of the railroad trains in our country, even for a day; much less a week. This being so, whatever may be the feeling in the community—that perhaps railroad employes ought to receive more than they do receive —still it is not in this way that it is to be remedied, because you make war upon society, and society will always arise under such circumstances against those who make war upon it. It is not possible that any one class of men can arise against a whole community, and seek to enforce its claims by violence and wrong, and expect that society will not re-assert its abused rights. It will as long as society exists.

Railroad employes must recollect that other people have rights as well as they, they have acted recently as though no one else had any rights except themselves. Merchants have rights, professional men have rights, farmers have rights, and even railroad companies have rights. All men and all corporations have their rights under the law.

It is not the desire of this court personally to punish any one of these defendants. The only object which the court has in view is to stop, so far as it can, any interference with the property under its control, and which it holds as a trust, and that must be done and an example must be made to show

that this interference cannot occur again without a certainty that the parties who are guilty will suffer punishment. The court will make the punishment as light as possible under the circumstances, but there must be a penalty imposed. Very few of you made any complaint on your own account of the Receivers of the road in the possession of the court; it was almost entirely an interference from outside parties.

It is true, perhaps, that some of you have been more guilty than others, some of you have taken a more active part in these wrongful acts than others, but it is difficult for the court to make a discrimination, and the punishment will be only such as the court thinks the person who is least guilty ought to receive.

The defendants will be imprisoned three months each, subject to the further order of the court.

See also *Secor vs. R. R. Co., ante*, p. 513—[*Reporter.*

CHARLES EDWARD CLARKE, Assignee, Etc. vs. SYLVESTER D. FOSS *et al.*

District Court.—Western District of Wisconsin.—March, 1878.

1. Contracts for Future Delivery.—A contract for the delivery at a future time of personal property, which the seller has not on hand when the contract is made, nor any means of getting it, is not void for illegality.

2. Secret Intention.—The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal.

3. Mutual Intent.—The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance, must

be mutual, and constitute an integral part of the contract, in order to render it invalid.

4. If the contracts were valid in their inception and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, by payment of differences, instead of by actual delivery, cannot make them void for illegality.

5. Many authorities cited and commented upon.

Thomas & Fuller, and *H. M. Lewis*, for complainants.

Dent & Black, and *Burr W. Jones*, for defendants.

William P. Black, for defendants, cited the following authorities:

In this case the *Lex loci contractus* determines the rights of the respective parties. These contracts were made and to be performed in Chicago, and are therefore to be governed by the laws of the state of Illinois. Edwards on Bills and Notes, §§ 177, 185; *Stacey vs Baker*, 1 Scammon, 417.

These contracts were valid under the decisions of Illinois. *Pixley vs. Boynton*, 79 Illinois, 351; *Logan vs. Musick*, 81 Illinois, 415; *Wolcott et al. vs. Heath*, 78 Illinois, 433; *Lyon vs. Culbertson*, 83 Illinois, 33; dissenting opinion of Mr. Justice DICKEY.

Such contracts are also held valid by the courts of other states of the United States, and by the English decisions. *Rumsey vs. Berry*, 65 Maine, 570; *Hibblewhite vs. McMorrine*, 5 Meeson & Welsby, 462; *Petrie vs. Hannay*, 3 Term Reports, 418; *Owen vs. Davis*, 1 Bailey, 315; *Porter vs. Viets*, 1 Volume of this Series, 177; *Lehman vs. Strassberger*, 2 Woods C. C., 554; *Knight vs. Fitch*, 80 English Common Law, 566; *Rosewarne vs. Billing*, 109 English Common Law, 316.

The facts sufficiently appear in the opinion of the court.

BUNN, J.—This is a suit in equity begun by the assignee of C. B. Stevens & Sons, bankrupts, to set aside and cancel six certain promissory notes for the sum of one thousand two hun-

dred and thirty-one dollars and ten cents each, aggregating seven thousand three hundred and eighty six dollars and sixty cents, and a mortgage upon real estate in DeSoto, in Vernon County, Wisconsin, to secure the same, executed by C. B. Stevens & Sons to the defendants, December 1, 1874, on the ground that the same are void as being given to secure a consideration arising out of certain option contracts for the sale and delivery of grain, which it is claimed were wagering contracts, under the laws of Illinois in force at that time.

The bankrupts were and for many years prior to the fall of 1874, when these transactions occured, had been merchants and dealers in grain and produce upon the Mississippi River at DeSoto, Wisconsin, and, as such, had for several years purchased and shipped wheat and other grain to the defendants, who were commission merchants at Chicago, and members of the Board of Trade for twenty years or more, doing business under the firm name of S. D. Foss & Co., and had, also, from time to time speculated in grain in the Milwaukee market, and also in the Chicago market, through the defendants, acting as their factors and commission men at that place. They were then in good financial circumstances, though with small capital; had a running account, and were in good credit and standing with S. D. Foss & Co. In October, 1874, the bankrupts ordered defendants, at different times, by telegraph, to make sales of grain for them upon the Chicago market for November delivery, amounting in the aggregate to seventy thousand bushels of corn, and five or ten thousand bushels of wheat. The defendants, upon receiving these orders, went upon the market in Chicago and executed them, by making, as was the custom, contracts, generally in writing, and in their own name, with different parties, for the sale of the grain for November delivery, in lots of five thousand, or multiples of five thousand bushels, and immediately and from time to time, notified bankrupts, by telegram and by letter, of what they had done, and their acts were fully ratified and approved by the bankrupts. No "margins" were required to be put up by

C. B. Stevens & Co., as they had an account with defendants, and were accounted by them responsible.

At about the time or a little before these contracts matured, as they did on the last day of November, the defendants performed a part of them on the behalf of C. B. Stevens & Sons, by a purchase and actual delivery of the grain to the parties to whom the sales were made. The evidence shows that, as to twenty thousand bushels of corn, there was an actual delivery of the grain, and as to ten thousand more, a delivery of warehouse receipts for that amount. As to the balance of the grain contracted to be sold, the defendants went upon the market and purchased it of different parties and had it ready for delivery; and then finding other parties who had similar deals for November purchases and sales, formed rings, or temporary clearing houses, through which, by means of a system of mutual offsets and cancellations that had grown up on the Board, the contracts were settled by an adjustment of differences, saving an actual delivery and change of possession. It so happened that there was a considerable rise in the market price of corn during the month of November; and it was found that, after these transactions were closed out, there had been a loss to C. B. Stevens & Sons of something over ten thousand dollars, and which the defendants, having paid in cash for them on the purchase of the grain, debited to their account, according to the previous course of dealing between the parties.

The notes and mortgage in suit were soon afterwards given by the bankrupts to secure a portion of these sums so advanced by the defendants for them, including also about three hundred and seventy-five dollars, charged by S. D. Foss & Co. as their commissions. Unsecured notes were also given for three thousand dollars, balance of the ten thousand three hundred and eighty-six dollars and sixty cents indebtedness, which were afterwards paid by C. B. Stevens & Sons.

Two years afterwards, on November, 19th, 1876, C.B. Stevens & Sons filed their petition in bankruptcy in this court, and

were on the same day adjudged bankrupts. The assignee in bankruptcy brings this suit to set aside the notes and mortgage, and in substance claims that C. B. Stevens & Sons, at the time the orders for the sale of grain were made and executed in October, 1874, had no corn to sell, and no expectation of having any, with which to fill these contracts. That these facts were known to both parties, that is to the bankrupts and to the defendants, S. D. Foss & Co., and that it was understood by and between them at the time, that no grain was in fact to be delivered by C. B. Stevens & Sons, but that the contracts were to be settled by the payment or receipt of differences, according as the market should rise or fall in the month of November, and that they were thus mere wagers upon the November market, and, as such, contrary to law, and void, and that the notes and mortgage confessedly given to secure cash advances made by defendants, as the factors of the bankrupts, and with their approval, to pay the losses sustained upon these sales, should be cancelled and delivered up.

The question is whether this should be done.

The question is, of course, a mixed question of fact and law. But I regard it as more a question of fact than of law; and I cannot help thinking, in looking through the cases on the subject, that more confusion and discrepancy has crept into them, from a failure to determine precisely the facts, than from any essential difference of opinion upon the abstract propositions of law applicable to them. This seems to be notably the case in *Rumsey vs. Berry*, 65 Maine, 570, where, in the trial court, instead of submitting the question of fact as to what the contract really was, it not being in writing, to the jury, instructions were asked, that, as a matter of law, the contract was a wagering contract. This instruction was properly refused, but there was a total failure to fairly submit the question of fact to the jury. It is not to be wondered at, that on an appeal to the Supreme Court, the facts not being fairly determined, the opinion sustaining the transaction as legal should have been given by a divided court, four judges

concurring in the decision of the court, one judge delivering a dissenting opinion, one judge concurring in the dissenting opinion, and still another judge "inclined to concur" in it. If there had been an eighth judge, it might not be improbable that he would have been "inclined to concur" in both opinions. And all this simply because the facts themselves not having been determined, there was no tangible, well-defined question of law before the court.

The testimony in the case at bar is quite exhaustive and voluminous. It is confined, however, to a few points, and though somewhat conflicting, I have had no great difficulty in determining the facts to my satisfaction. It is proven that, at the time these contracts were made, C. B. Stevens & Sons had not the grain on hand at DeSoto, where they purchased grain, or elsewhere, nor any expectation of having it, with which to fill the contracts.

Chas. B. Stevens, the active member of the bankrupt firm, testifies that at the time he telegraphed to defendants to purchase the corn, they had not a bushel on hand, and did not expect to have any to deliver on the orders; that they were not then dealing in corn at DeSoto, or anywhere else, and never did except "scalping" in it at Chicago; that they had no agreement with defendants to ship corn to fill the orders, and that the understanding was that they were merely "scalping" or option deals, and were to be settled by paying or receiving the difference at the maturity of the contract, or before; that they never did deliver any corn on these sales; that defendants claimed that they bought in the options at different times and charged the difference to C. B. Stevens & Sons.

He says, also, that he had no conversation with defendants until after the transactions were closed up; that he then had a talk with both of them in relation to these deals; that it was on the Board of Trade at Chicago; that he asked M. H. Foss how they settled these options or "scalps," and if there was any wheat or corn delivered, and he said, no; that

it was done generally by forming rings among members of the Board, by clerks that they employed; that these clerks settled the deals between parties in the ring whom they may have sold to, or bought of, and by paying or receiving differences, as the case may be; that he thinks he asked him about the delivery of grain, and he said no grain ever passed. Witness says this was the kind of transaction he was operating in, as he understood it, and that no grain was to be delivered or received on these contracts, and that he understood them to be mere wagers on the future price of grain, and that defendants regarded them in the same light. That they continued this kind of deal with defendants until the fall of 1876.

On cross-examination he says, he commenced sending orders to defendants before he had any conversation with them; that it was a month after these transactions that he had the talk with them in Chicago; that defendants were their agents and commission merchants in Chicago; that he understood that Foss & Co. were liable for the damages for the non-fulfillment of the contracts they made for C. B. Stevens & Sons, and that they expected to make good to them the losses which they might incur in their behalf; and that if defendants failed to comply with the contracts they made for the bankrupts they would be deprived of their privileges on the Board of Trade; that Foss and he never talked about their agreement with one another in respect to these transactions, and that their conversation only related to the general course of business on the Board of Trade; that he (witness) understands that all contracts where wheat is sold, and not actually delivered, are wagering or betting contracts; and that all option contracts are betting contracts. The other Stevenses testify substantially in the same way as to their understanding of the transaction, but not as to the conversation with defendants in Chicago. And this is the substance of the testimony for the complainant. The defendants positively deny the conversation testified to by C. B. Stevens. They swear (in substance) that they had no understanding about these contracts, dif-

ferent from what might be inferred from what appears on the face of the transaction itself; that they were executed in their usual course of business, in the same manner that all the business on the Board of Trade relating to option contracts for future delivery of grain is transacted; that instead of understanding that no wheat or corn was to be delivered, their understanding was just the contrary; that the grain must be delivered according to the terms of the contract in all cases; that there was no option in the matter except as to the day in November on which the delivery was to be made; that if not delivered before, it must at all events be delivered on the last day of the month; they did not know whether Stevens & Sons had the grain to ship from DeSota, and did not stop to inquire, but supposed they might have it; that if they did not ship it, they (Foss & Co.) were bound to deliver the grain for them; that the contracts, according to universal custom on the Board of Trade, were made in the name of S. D. Foss & Co.; the name of their customer not being disclosed to the other party, or even inquired after. They testify that they have never dealt in what are called "puts" and "calls," such as are described in *Ex parte Young*, 6 Vol. of this series, p. 53, and that such contracts, which give the option to deliver or receive, or not, are prohibited by the Board of Trade as well as by the laws of Illinois; that they made these contracts with various members of the Board of Trade, for and on behalf of the bankrupts, at their request, and for their benefit, in entire good faith, without any understanding that they were not to be performed, and that Stevens & Sons not shipping the grain, they performed their contracts by going upon the market and purchasing the wheat and corn; that as to thirty thousand bushels of corn they made a delivery, and as to the balance they closed out the deal in the manner before indicated, by mutual offset and adjustment of differences; that this adjustment of differences is a mere matter of convenience to the members of the Board, and to their customers; that no person is under the least ob-

ligation to settle in that way, and that dealers may and often do insist upon an actual delivery of the grain, and that settlement frequently saves to their customers the cost of insurance and storage. That the object of forming these rings or clearing-houses, is to close out the transactions and get them off their books; and this is what they call "ringing it out." But that it frequently cannot be done in that way; as if, for any reason, one whose assistance is essential to complete the circle, prefers an actual delivery, in which case the ring is "burst;" and then each must perform his contract by actual delivery of the grain. Their testimony is full, and fair, and intelligent upon the questions at issue, and they are corroborated by several other witnesses, ex-president, ex-directors, ex-commissioners of appeals, and present members of the Board of Trade, and some of the persons with whom these contracts were made. The testimony is conclusive that this business was done much in the same manner that all the other business on the Board of Trade is done respecting contracts for the future delivery of grain. They all agree that there is no option except the option to deliver on any day of the month; and that the seller is bound, not only by the contract but by the rules of the Board, to which it is made subject, to perform his contract by an actual delivery, unless excused from the performance by the act of the other party; and for a violation of this rule he is subject to the discipline of the Board, and to be dismissed therefrom if he insists upon the violation of his contract.

Now, which party is best corroborated in their understanding of the contract by the admitted facts of the case?

It is clear to me, by all odds, that the defendants are best corroborated.

It is very easy for either party to swear to what his own understanding of the contract was, but that standing alone is manifestly immaterial. The secret intentions of one party contrary to what appears on the face of the contract, and not communicated to the other party, cannot prevail to make a

contract illegal which is otherwise valid. The real question is, what was the contract? and that implies an inquiry as to the mutual understanding and meeting of the minds of the parties. What was that? It is easy for a party to swear what his own understanding and intentions were, but when he comes to swear to the intentions and understanding of the other party, the consideration due to his testimony stands on an entirely different footing. He may be presumed to know his own intentions, but the evidence of the intentions of the other party should not be of a merely subjective character, but should consist of tangible facts and circumstances outside of his own consciousness, and a knowledge of which would be capable of satisfying other minds.

The conversation with the defendants testified to by Stevens, besides being denied by them, if proven, is not very strong evidence, for Stevens admits that this was a month after these transactions occured, and was a general conversation relating to the general manner of doing business upon the Board, and not to the transactions in question. But aside from the testimony as to this conversation, what is there in the case to show that S. D. Foss & Co. had any intention in regard to these contracts different from what is fairly evidenced by the contracts and transactions themselves, as they appear upon their face? The telegrams were orders in writing, and gave positive directions to sell grain; not to sell a privilege to deliver or not. The evidence shows at the time they were made there had been no previous communications or understandings in regard to these purchases. When received, Foss & Co. went upon the market and executed the orders by making written contracts of which the following is a blank copy, or verbal contracts to the same effect:

"GRAIN CONTRACT. CHICAGO,—1874.

"We have this day sold A. B. & Co. ten thousand bushels of No. 2. corn, in store, at cents per bushel, to be delivered at sellers' option during the month of November, 1874, in lots of 5,000 bushels each. This contract is subject,

in all respects, to the rules and regulations of the Board of Trade of the city of Chicago.

"M—at—cts. "S. D. Foss & Co.
"Per——."

When these contracts matured, the defendants performed them by a delivery of the grain, except when, by the mutual arrangement of the parties concerned, the contracts were taken up and cancelled, and then they invariably paid in cash the damages which the law would have obliged them to pay upon a failure to perform their agreement; that is to say, the difference between the contract price and the market price on the day when delivery should have been made.

Now, in the absence of more convincing testimony, what the parties actually did is pretty good evidence of what they intended to do; and I must conclude that upon the face of the transaction, as shown by the acts and conduct of the parties, the evidence is very strong that these sales were *bona fide* sales, and not made with any intent, mutual between the parties, to violate the law.

The notes and mortgage sought to be set aside (as well as the original contracts for the sale of the grain, both as between the bankrupts and S. D. Foss & Co., and between S. D. Foss & Co. and the parties with whom they contracted), being in writing and perfectly fair on their face, and given for a full money consideration without any pretense of fraud or unfair dealing, the burden of making a clear case for setting them aside for illegality, lies with the complainant. There should be in his favor a clear preponderance in the weight of the evidence. *Pixley vs. Boynton*, 79 Illinois, 351. Contracts made and so deliberately entered into upon adequate consideration, without fraud, should not be set aside for light or transient reasons, or mere suspicion of being contrary to law. But instead of there being a preponderance of proofs in favor of the complainants, I am obliged to believe that the weight of evidence is the other way, and I must find as facts:

1. That C. B. Stevens & Sons, when they gave the orders for the sale of the grain, had no grain to deliver, no contracts made by which they expected to obtain it, and no expectation of ever having it delivered, by shipping it to the defendants.

They did expect and intend, however, that S. D. Foss & Co. would make these contracts much as they did, in fact, make them, and that they would, at their maturity, take care of them for C. B. Stevens & Sons in about the same manner they did take care of them, by a delivery of the grain, or by a settlement and adjustment of differences according to circumstances; and that whatever the profits were, they were to be credited with them, and if there were losses, such losses were to be borne by them.

2. That the defendants did not know that C. B. Stevens & Sons had not the grain, but had no reason to expect that they had or would obtain it to ship to Chicago in sufficient amounts to fill the orders, but intended that if C. B. S. & Sons did not ship the grain, they (defendants) would perform their contracts with the parties with whom they were severally made in C. B. Stevens & Sons' behalf, in good faith, by a delivery of the grain, unless delivery was dispensed with by the parties who had a right to insist upon a fulfillment of the contracts, and that there was no mutual understanding that the contracts were mere wagers on the price of grain for the November market, or that there was to be, in fact, no delivery, but only an adjustment of differences.

3. The understanding of the other parties to these contracts, to whom sales were made, as to their being performed, was the same as that of the defendants.

Having determined the facts, the law applicable to the case is not difficult.

1. The contracts sought to be set aside are written contracts, and the mortgage is under seal. Nevertheless, the weight of authority, and I think that of doctrine is, that you may go behind the writing and show what the real intent and meaning of the parties were; and if it appears that the writ-

ing does not express the real intent of the parties, but is merely colorable, and used as a cloak to cover a gambling transaction, the court will not lend its aid to enforce the contract, however fair on its face; or if securities are given, as in this case, will interfere on grounds of public policy and for the public good, rather than for the purpose of relieving a party who is himself *particeps criminis* in an inhibited transaction, to set aside such securities. *In re John Green*, *Ante* p. 315, and the cases there cited.

2. A contract for the future delivery of personal property, which the seller has not got when the contract is made, nor any means of getting it, is not void for illegality.

That was held in *Porter vs. Viets*, 1 Bissell, 177, and is the settled law. See *Logan vs. Musick & Brown*, 81 Illinois, 415; *Hibblewhite vs. McMorrine*, 5 Meeson and Welsby, 462.

The seller is bound by the contract to deliver the goods, and if he fails he must pay damages.

Such contracts, though entered into for pure purposes of speculation, however censurable when made by those engaged in ordinary mercantile pursuits, and who have creditors depending for the payment of their just claims upon their prudent management in business, are nevertheless not prohibited by law.

As said in *Porter vs. Viets*, *supra*, "People might differ about the propriety of making such a contract by one who did not know certainly where he was to acquire the property, but, having made it, the courts will compel him to abide by it." That case was on demurrer, and was in many essential respects similar to the one at bar.

The substance of the contract itself is what must control. The secret intention of one of the parties uncommunicated to the other party, not to fulfill his contract, is not enough to make the transaction illegal. The intent that it should be a mere betting upon the market, without any expectation of actual performance, must be mutual, and constitute an integral part of the real contract, in order to vitiate it.

Furthermore, supposing it had been the mutual intention of S. D. Foss & Co. and the bankrupts, that these contracts were not to be performed, I do not see that that would make them illegal, so long as the other parties to the contract did not participate in that illegal intention. S. D. Foss & Co., and C. B. Stevens & Sons did not constitute the parties to the contract. There was no contract for the sale and delivery of grain made betweem them. As between them the relation existed of principal and agent. S. D. Foss & Co. made the contract in their own name, but for, and in behalf of C. B. Stevens & Sons; and S. D. Foss & Co. and C. B. Stevens & Sons constitute but one party to the contract, whether it be considered as a contract between S. D. Foss & Co. and the parties in Chicago, with whom they dealt, or as a contract between C. B. Stevens & Sons and those same parties; and there is no evidence, whatever, to show that those other parties had any notice or knowledge of this gambling intent. On the contrary, they knew that Foss & Co., as the evidence shows, and some of these same parties testify, were men of high standing and responsibility on the Board of Trade, and would perform their agreements. *Lehman Bros. vs. Strassberger*, 2 Woods, C. C., 554, and *Wolcott vs. Heath*, 78 Illinois, 433, are directly in point.

4. If the original contracts for the sale of grain were liable to the taint of illegality, as charged, it does not necessarily follow that the notes and mortgage executed by one of the principals in the transaction, to secure the payment of moneys previously advanced by their agent to pay losses springing out of, and resulting from those original transactions, are contaminated with the same vice.

This question is fairly presented by this record, though the decision of the point is not necessary to the case, and I do not care to decide it. I shall, therefore, content myself with reference to some few high authorities, which hold such a contract valid. The leading English case, decided by Lord Mansfield, is *Faikney vs. Reynolds*, 4 Burr., 2,069. Follow-

ing this are *Petrie vs. Hannay*, 3 Term, 418; *Farmer vs. Russell*, 1 B. & P., 296.

The first case cited is a strong case, and though seemingly questioned by Lord KENYON in *Petrie vs. Hannay*, *supra*, has never been overruled, I believe, in England. MARSHALL, C. J., cites it approvingly in *Armstrong vs. Toler*, 11 Wheaton, 258. See, also, *Owen vs. Davis*, 1 Bailey, 315, and the recent case before cited of *Lehman vs. Strassberger*, 2 Woods, 554, which is very much in point, I think. This, I believe, is undoubtedly the result of the English cases. How far the rule has been changed by statute, or by decisions in the several states, I do not care to inquire.

5. Whatever might be the judgment of discreet men as to the propriety of such purely speculative transactions as are disclosed by this record, undertaken by men in mercantile pursuits, I am unable to see, on general principles, any objection to them in point of law. The law does not undertake to prevent speculation. It does not undertake the Quixotic task of nicely governing men in all the relations of life, and compelling them to do, under all circumstances, what is prudent and reasonable. The truth is, men are speculative creatures as certainly as they are eating and sleeping ones. And, although it is undoubtedly true that much harm comes to the community from over speculation, it is more than doubtful if the world would be better off without speculators; or, if it would be, that the law can do much in the way of abolishing them.

As a common thing, business men are prone to regard their own judgment of the market as a part of their capital, and to a certain extent they have a right so to do.

It is only with the more manifest abuses of the privileges of citizens in their dealings with one another, and when the evil touches and infects the public welfare, that the law assumes to interfere. In the main, commercial transactions must be left to be regulated by the higher and more inexorable laws which govern the trading world. If the transactions

disclosed by this case are illegal, then, undoubtedly, a great part of the banking and clearing-house transactions in our great commercial centres are illegal also.

I am persuaded that to hold them so would be trenching too severely upon the business of the commercial world, without any corresponding benefit to be expected from it.

It might be a difficult task to lay down any single rule or draw a straight line which should define or divide all merely speculative from all pure gambling transactions, for it must be admitted that the same prime element of risk is common to both. But it has seemed to me that, according to any reasonable rule which it would be practicable to enforce, these transactions must fall on the side of legal speculations. They were carried on in good faith, and in the usual and ordinary course of business, upon the Board of Trade, which it seems undertakes to exercise a salutary control over its members; it appearing in evidence that if any member fails or refuses to perform his contract by delivery or receiving grain which he has agreed to deliver or receive, he is subject to the discipline of that body; and if the offending member is still refractory or contumacious, he is suspended or finally dismissed from the Board; thus adding to the penalties which the law attaches to a violation of contracts, the sanction of a wholesome family discipline. The witnesses agree that what are called "puts" and "calls" are not allowed to members of the Board, and that "scalpers" cannot live in that atmosphere, they bearing the same relation to that fraternity of commercial gentlemen that shysters do to full-bred lawyers. If that be so, certainly they are far enough asunder.

Then again, if we look at the equities of this case, aside from the special head of equity, under which the court, in the interest of the public good, will interfere to set aside and cancel securities given upon a gambling consideration, the general equities and intrinsic justice of the case are largely with the defendants. The whole business was originated and carried on at the instance and for the benefit of the bankrupts. What-

ever of legal turpitude attaches to these transactions, it is evident that C. B. Stevens & Sons were not merely *particeps criminis*, but the principal offenders. When profits ensued, as they frequently did, they put them down in their own pockets. On one occasion it is in evidence that they represented to defendants that they made quite large amounts, something like ten thousand dollars out of these deals. Why then, if it was their deal, and they enjoyed the profits when there were profits, should they not bear the losses when the market turned against them and these fell to their lot, and not shuffle them off upon their agents who, it is not denied, had acted fairly and honorably with them?

Foss & Co. had no interest in these transactions, except their commissions, and instead of leading the bankrupts on in this business, the evidence of the bankrupts is that they discouraged them on every occasion. Their letters, introduced in evidence by the complainant, show that S. D. Foss & Co., from time to time, dissuaded the bankrupts from these speculating deals—told them they were taking too much risk, both in respect to wheat and corn; that there was a small stock of old corn in the market; that the new crop had not yet been moved; that there was danger of a "corner" being run, and sending prices up, and on one occasion protested that if they insisted upon taking such risks, they must employ other commission men. These letters were relied upon to show that the defendants understood these deals to be gambling transactions; but to my mind they simply show a proper appreciation, on the part of the defendants, of the risks which men, in the circumstances and business of the bankrupts, were taking on themselves, and a due consideration for the interests of their principals in that behalf. But C. B. Stevens & Sons, relying confidently on their own judgment and sources of knowledge, as men are inclined to do, continued the business until the tide turned against them. Under these circumstances, one would say that the commonest kind of honesty that passes current among men should require

C. B. Stevens & Sons to pay these losses, and not shift them off upon their factors. Of course the assignee stands, as far as legal right goes, in no better case than the bankrupts; and it is due to the bankrupts to say that, as far as they are personally concerned, they have never objected to the payment of these claims, though they are now the main witnesses for the complainant, and in their testimony say they want him to succeed. The assignee, of course, in the interest of the creditors, has only done his duty in bringing these matters before the court for adjudication.

I have not undertaken to review the decisions upon this subject. I have not thought it essential. Those of the highest tribunal in Illinois, though not perhaps entirely reconcilable, I think are so in the main, and go to support the transaction disclosed by the case at bar. Whatever discrepancy there is, as I have before remarked, arises more from the facts than from the law. The most that can be said is, that different courts have come to different conclusions upon different states of facts. This cannot be wondered at, and is unavoidable. How far the judgment of the court, in a given case upon the facts, may be influenced by its opinion of the law and the essential justice of the case, cannot always be known. I confess I have a strong predilection in favor of holding men of full age and right mind to their contracts deliberately entered into upon full and adequate money considerations, without deceit or imposition, and when the consequences of their contracts, however ill-advised, are mainly personal to themselves.

I think the cases cited of *Wolcott vs. Heath*, 78 Illinois, 433, *Pixley vs. Boynton*, 79 Illinois, 351; and *Logan vs. Musick*, 81 Illinois, 426; express the law of that state on the subject, and are authorites in the case at bar.

The case of *Lyon vs. Culbertson*, 83 Illinois, 33, in which Justice Dickey delivers a rigorous dissenting opinion, I am told was decided before the cases in the 79th and 81st Illinois Reports. However that may be, and whether the decision be good law or not, I do not see that it is necessarily at

variance with the other cases, nor that it attempts to overrule or qualify them in the least.

That seemed to turn on a question that is not presented in this case.

There is no failure to perform, or of offer to perform, on the part of S. D. Foss & Co., on any of the contracts which they made; nor anything in the contracts dispensing with an offer to perform.

Again, it must be incontestible, that if the contracts were valid in their inception, and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, which took the place of actual performance, cannot have the retroactive effect of making them void for illegality. If the contracts were void at all, they must have been void when made. The subsequent conduct of the parties may, and should be considered as evidence tending to show what the real contracts were when entered into; but if they were originally valid, no subsequent act of the parties can have the effect to render them obnoxious to the taint of illegality as being gambling contracts.

I have not overlooked the case of *In re* Green, *supra*, decided by my learned and lamented predecessor *ante*, p. 338.

I have not had occasion to review the evidence from which the conclusions of fact in that case were drawn; and it is enough to say that upon the findings of fact made, the law is undoubtedly correctly stated.

Bill dismissed.

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5. ESTOPPEL.—A party by neglect of an ordinary duty, as to look after his interest for an unreasonable length of time, is presumed to have approved of the management of the person having it in charge, and by such gross neglect is estopped from denying the existence of the authority exercised by the party claiming to represent him. *Id.*

6. PRIOR ADJUDICATION.—The adjudication of a firm in one district does not prevent a subsequent adjudication in another district of a firm which is partly composed of the same persons. *Id.*

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8. ATTACHING CREDITORS NOT COMPUTED.—Attaching creditors are not to be counted nor their claims computed in ascertaining whether the petition for involuntary bankruptcy is supported by the "number and amount prescribed by statute." *In re Jewett*, 242.

9. POSTPONEMENT OF PROOF OF DOUBTFUL CLAIMS.—Where there is a reasonable, substantial doubt in the mind of a Register as to the validity of any claim, and as to the right of the alleged creditor to prove it, he can postpone the proof of such claim until after the election of an assignee. *In re Jackson*, 280.

10. PRACTICE—REVIEW.—Where a review by the District Judge of the action of the Register in such cases is sought, the better practice on behalf of creditors who object to the postponement of such claims, is to at once have the objection entered, obtain a stay of proceedings, and have the case certified before any further action before the Register is taken, for if no objection is made at the time and the assignee is appointed and enters upon his duties the court will not interfere. *Id.*

11 PROOF OF DEBT BY AGENT.—It is not a sufficient cause for the proof of a debt by the agent that the principal is "traveling and supposed to be in Colorado," as the statute when it mentions absence of the claimant as ground for verification of the claim by an agent, speaks particularly and only of absence from the United States. The words "some other good cause" mean some sufficient cause other than mere absence from the state. *Id.*

12. IRREGULARITY IN ADMITTING CLAIM.—Where a claim is irregularly admitted, but the result of an election of assignee would not be

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changed by its exclusion, the court will not set aside the proceedings on account of irregularity in admitting this claim. *Id.*

13. Upon failure to elect an assignee by the creditors, the Register may appoint one, if specific objections are not made. *Id.*

14. "OPPOSING INTEREST,"—In the Bankrupt Act § 5034 means an opposition to the exercise of the appointing power by the Register—not an opposition to the appointment of any particular person. *Id.*

15. SECURED CLAIM.—An indorsed promissory note is not a secured claim within the meaning of § 5075 of the Bankrupt Act. *In re Broich et al.*, 303.

16. LIEN.—A creditor seizing property under process of attachment issued from the state court within four months prior to the commencement of bankruptcy proceedings, is not considered as having a secured claim, and may be counted in estimating the number and amount of the creditors of the bankrupt. *Id.*

17. Such a creditor has only an inchoate, conditional lien, and not a fixed, absolute, vested and continuing one, as intended by the statute. *Id.*

18. COMPUTING NUMBER AND AMOUNT.—In computing the number of creditors who shall join in the petition, creditors whose debts do not exceed two hundred and fifty dollars shall not be reckoned; but in computing the amount or value, all claims should be included regardless of amount. *Id.*

19. Where an indorsee of a note proved up his claim against the estate of the makers, and afterwards and during the pendency of the bankruptcy proceedings received payment from the indorser, his relation to the liability ceases, he is no longer a creditor of the makers, and all claim against the makers, so far as he is concerned, is extinguished, and consequently he can take no further part in the proceedings. The indorser becomes subrogated to his rights, and the demand becomes one in favor of the indorser alone against the makers. *Id.*

20. WAIVER.—The act of joining in a creditors' petition by a secured creditor, without reference to the security, is a waiver of such security. *Id.*

21. The transfer to one of the creditors of a bankrupt, of the book accounts within two months of commencement of proceedings, is not presumptively a fraudulent preference. *Id.*

22. HOMESTEAD EXEMPTION.—In Wisconsin, does not extend to a business block, used as a dwelling. The question is not determined by occupation, but by the character and construction of the building. *In re Lammer*, 269.

23. If there is a dwelling house and a store upon the same lot, the assignee can set off the former as a homestead. *Id.*

24. DIVISION OF BUILDING.—The court will not divide a building and assign the bankrupt a part occupied by him. *Id.*

25. EXEMPTION—STOCK IN TRADE.—Under the laws of Wisconsin, exemptions will not be allowed from the stock in trade, or from articles simply bought for exchange and which are not "used and kept for the purpose of carrying on the trade or business." *Ex parte Robinson*, 126.

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to show cause issued on a creditor's petition in bankruptcy, provided that a copy of the petition should be served with a copy of the order. *Held*, that the Marshal was entitled to a fee for the service of each, even though they were served at the same time. *In re Burnell Bros.*, 275.

28. DISBURSEMENTS.—Section 829 of the Revised Statutes, providing that the Marshal shall be allowed "for disbursing money to jurors and witnesses and for other expenses two per centum," held not to be limited to expenses of court. *Id.*

29. NOT ENTITLED TO COMMISSION ON PROPERTY.—The Marshal is not entitled to an allowance for the custody of property by way of commissions on its value. *In re Johnston & Hall*, 12 Bankruptcy Register, 345, commented on. *Id.*

30. NON-JURIDICAL DAY—ENTRY OF TRANSCRIPT OF JUDGMENT ON CHRISTMAS DAY—MINISTERIAL ACT.—The act of the circuit clerk in filing the docket transcript of a judgment, is a ministerial act, and not void, though done on a non-juridical day, and the judgment creditors thereby acquired a lien upon the real estate of the judgment debtor the same as if done on any other day. *In re Worthington*, 455.

31. PRIORITY OF ATTACHING AND JUDGMENT CREDITORS.—Where an attachment upon property of the bankrupt for its full value is dissolved by an adjudication, a judgment creditor who has made a levy subject to such attachment is not entitled to priority as against the assignee. *In re Steele*, 504.

32. But where a creditor has obtained a valid and effectual lien by attachment, and has prosecuted his suit to judgment, and made an execution levy, his lien under such levy is to be considered as prior in time to that of other creditors who have levied attachments intermediate the attachment and execution levy of such creditor, and is not affected by the dissolution of such attachments. *Id.*

33. PRIORITY.—The state has no claim for priority where the Warden of the Penitentiary deposits funds in his own name, as Warden, in a bank which afterwards becomes bankrupt, the Warden being liable to the state on his bond for the amount. *In re The Corn Exchange Bank*, 400.

34. GUARANTY—DOES NOT MAKE SECURED DEBT.—A guaranty is not such a security under the meaning of the Bankrupt Law that the creditor must surrender it to the assignee if he desires to prove his debt in full, and such creditor has the right to prove such debt as an unsecured one. *In re Anderson*, 233.

35. STATUTORY LIEN.—A lien which derives its existence wholly from a state statute, and the continuance of which is by such statute made dependent upon the commencement of a suit in the state court within a prescribed period, is not preserved as a valid living incumbrance upon the bankrupt's estate, when no suit has been commenced in the state court and no step taken in the bankrupt court equivalent to such suit within the time limited by the statute for the preservation and enforcement of the lien. *In re Brunquest*, 208.

36. Such a lien, liable to lapse from omission to do an act required to be done for its preservation by the statute creating it, is not kept alive

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and continuing by virtue alone of the commencement of bankruptcy proceedings. *Id.*

37. The failure of lien claimants to present their claims or liens for recognition and enforcement to the bankrupt court within the period limited by the statute, bars such claims as effectually as omission to bring suit if the bankrupt were solvent. *Id.*

38. WARRANTS OF ATTORNEY.—Warrants of attorney given by a debtor to his creditor, even when given more that two months before bankruptcy proceedings are fraudulent, if the creditor knew at the time they were given that the debtor was insolvent. *In re Herpich*, 387.

39. ILLEGAL PREFERENCE.—If, under such warrant of attorney, the debtor gets judgment and levies an execution, he will not be allowed to have a preference. *Id.*

40. Conflicting decisions of the United States Supreme Court cited and commented upon. *Id.*

41. GAMING CONTRACTS.—Contracts of sale that do not contemplate the actual *bona fide* delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time are gambling contracts, and the broker stands in no better position than the seller to recover differences. *In re Green*, 338.

42. NOTES VOID FOR WANT OF CONSIDERATION.—If there is no legal liability to pay a claim, notes given therefor are void for want of consideration. *Id.*

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45. SECRET LIEN.—Such an agreement is a secret lien, and a fraud on the rights of creditors. *Id.*

46. RIGHTS OF ASSIGNEE.—The adjudication of bankruptcy is equivalent to a judgment and levy, and the assignee has the same right to have such a transaction nullified as a judgment creditor would have. *Id.*

47. ASSIGNEE REPRESENTS CREDITORS.—An assignee not only represents and stands in place of the bankrupt, but he also represents the creditors. He has a stronger right than the bankrupt. He can contest claims and rights to property which the bankrupt cannot contest. *Id.*

48. GIFT OF PERSONAL PROPERTY BY INSOLVENT HUSBAND TO WIFE,—Without any visible change of possession, does not constitute an adverse interest in the wife so as to compel the institution of separate proceedings for the purpose of litigating the rights of the parties. *In re Pierce & Whaling*, 426.

49. SUMMARY JURISDICTION OF BANKRUPTCY COURT.—On a petition by the assignee of the husband for the possession of the property, an affidavit by the husband, that the property is in possession of his wife is not a sufficient answer; and the bankruptcy court can compel the property to be turned over to the assignee. *Id.*

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50. PRACTICE.—Upon such a petition by the assignee, the court should require the bankrupt to answer. *Id.*

51. FRAUDULENT CHATTEL MORTGAGE.—A chattel mortgage given to secure a debt and also covering other property, which is used by the mortgagor as his own and for his own benefit, is fraudulent against creditors, and the instrument is void. *In re Burrows*, 526.

52. A mortgage given in part to defraud creditors is void altogether. *Id.*

53. MARSHALLING OF ASSETS—MODE OF MARSHALLING.—A creditor who held several judgment notes against a person afterwards declared bankrupt, and also mortgages and two insurance policies as collateral security, a few days before the filing of the petition in bankruptcy, caused judgment to be entered upon the notes, and executions to be issued thereon. *Held*, that the court had power to so marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund. *In re Sauthoff & Olson*, 167.

54. MORTGAGE LOANED BY THIRD PARTY TO BANKRUPT.—This rule would not extend to a mortgage loaned by a third party to the bankrupt, to be used as a security for the payment of the judgment notes. The rights of the assignor of such a mortgage would be superior to those of the assignee in bankruptcy. *Id.*

55. POLICY PAYABLE TO WIFE.—The same principle applies to the case of a policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee. But the mortgage of the bankrupt and wife, to the petitioner, and the policy of insurance payable to the bankrupt in this case, fall within the general doctrine of marshalling securities, and the petitioner to that extent is to be regarded as doubly secured, and should be required to first exhaust his remedy on them, and be allowed the balance out of the general fund in court. *Id.*

56. HOMESTEAD.—The fact that a part of the property is a homestead does not change the rule requiring a party having security on two funds, to first exhaust his remedy upon the fund he alone was secured upon, where there is another party having security on the other alone. *Id.*

57. SUIT BY ASSIGNEE.—An assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the bankrupt act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations. *Cady vs. Whaling*, 430.

58. FRAUD.—JURISDICTION OF COURT OF EQUITY.—Courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter. *Id.*

59. An assignee in bankruptcy stands in the same position as a judgment creditor and can bring a suit in equity to set aside a fraudulent conveyance. *Id.*

60. PARTNERSHIP ASSETS.—The assets of a firm in the possession of one of the partners are held in trust for the creditors of such firm, and if the partner in possession of them is afterwards adjudged bankrupt they are not assets in the hands of his assignee, and if he obtain pos-

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61. FRAUDULENT SALE.—A sale by a retail dealer of his entire stock at once is presumably fraudulent, and the presumption of fraud arising from the unusual nature of such a sale can only be overcome by proof on the part of the buyer, that he used all reasonable means to ascertain that the sale was an honest one. *Main vs. Glen*, 86.

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CHATTEL MORTGAGE—*See* ADMIRALTY, 22—MORTGAGES.

1. FRAUDULENT CHATTEL MORTGAGE.—A chattel mortgage given to secure a debt and also covering other property, which is used by the mortgagor as his own and for his own benefit, is fraudulent against creditors, and the instrument is void. *In re Burrows*, 526.
2. A mortgage given in part to defraud creditors is void altogether.

CHECKS—*See* NOTES, BILLS AND CHECKS, 12-18.

CHRISTMAS—*See* BANKRUPTCY, 30.

CONDEMNATION—*See* TELEGRAPH COMPANIES, 2.

CIRCUITY OF ACTION—*See* PRACTICE, 3

COLLISION—*See* ADMIRALTY, 10, 11, 15-17.

CONFLICT OF LAWS.

1. In cases where Congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued, such legislation should be followed, although opposed to the forms and mode of proceeding prevailing in the state courts and established by state statutes. *Easton vs. Hodges*, 324.
2. As to general principles of law the Federal Court has the right to follow its own views, and is not bound by the decisions of the state courts. *Mohr vs. Manierre*, 419.

CONSIDERATION—*See* BANKRUPTCY, 41, 42, 48—CHATTEL MORTGAGES—BILLS OF SALE.

CONSIGNOR'S LIEN.

1. COMMISSIONS AS AGAINST BONA FIDE HOLDER OF BILL OF LADING.—Although the *bona fide* holder of a bill of lading is entitled to the proceeds, the consignee has the right to deduct his commissions, and also the charges and insurance advanced by him. *Wolf vs. Smythe*, 365.

CONSPIRACY—*See* REVENUE LAW—CRIMINAL LAW.

CONSTITUTIONAL LAW.

1. STATE TAX ON INTER-STATE TRANSPORTATION.—The penalties against a foreign corporation prescribed by the seventh section of the Indiana statute of 21st December, 1872, for omitting to make return of its receipts for transportation through the state cannot be enforced. *Indiana vs. American Express Co.*, 227.
2. A tax by a state upon transportation through the state is an interference with inter-state commerce, which it is not competent for a state to restrict. *Id.*
3. LEGISLATIVE CONTROL OVER MUNICIPAL CORPORATIONS.—Counties and towns are, as to their corporate existence, completely within the control of the Legislature. They may be changed, altered, enlarged, diminished or extinguished, by the mere act of the Legislature. *Beckwith vs. City of Racine*, 142.
4. When a town is thus obliterated, an action at law cannot be maintained against it, for it cannot be served by process through its officers, for although the officers of a municipal corporation hold until their successors are elected and qualified, still where no successors could be elected, they cease to hold. *Id.*
5. A contract entered into previously, is not destroyed and annulled by the

CONSTITUTIONAL LAW—*Continued.*

obliteration of the town, for the power of taxation still remains. It is only transferred to other corporations. *Id.*

6. It is not competent for the Legislature of one state to declare that its citizens shall not make a contract in another state. *Lamb vs. Brewer*, 315.

CONTEMPT OF COURT.

1. INTERFERENCE WITH PROPERTY IN HANDS OF RECEIVER.—Property held in trust by the court for the purpose of protecting it pending its foreclosure, and over which a Receiver has been appointed, is in the possession of the court, and any interference with it is punishable as a contempt. *Secor vs. T. P. & W. R. R. Co.*, 513.
2. INTERFERENCE BY STRIKERS.—Where a railroad is in the hands of a Receiver, and the employes of another road who have struck, or any other persons prevent the employes of the Receiver from working, they commit a contempt of court and are to be treated in as summary a manner as if the contempt were committed in the actual presence of the court. *Id.*
3. A Receiver being an officer of the court, whose duty it is to protect the property and operate the roads under the direction and order of the court, the property thus placed in his possession is considered as property belonging to the court, and entitled to its protection. *King vs. O. & M. R. Co.*, 529.
4. SUMMARY PUNISHMENT OF RIOTERS.—In proceedings for a contempt, the court can proceed in a summary manner, and the accused is not, of right, entitled to a trial by jury. *Id.*
5. Where the offense is clearly proved the court will proceed summarily to punish an offender. *Id.*
6. Interference with the running of railroad trains is an offense public in its character. *Id.*

CONTRACTS.

1. CONTRACTS WITH MUNICIPAL CORPORATIONS—AUTHORITY OF MUNICIPAL OFFICERS TO MAKE TIME CONTRACTS.—The city of Chicago has not the right to contract for lighting the streets and public buildings for a term of years. *Garrison vs. City of Chicago*, 480.
2. SEMBLE.—If the other contracting party has gone to great expense in pursuance of such a conrtact, a strong equity may arise in his favor. *Id.*
3. The officers of a municipal corporation should be held to a rigid accountability in the discharge of their duty in regard to contracts of such corporation; and in all cases of contracts to run for years, the authority to make them should be clear, because they involve pecuniary liability which will be a tax upon future property owners of the city. *Id.*
4. CONTRACTS FOR FUTURE DELIVERY.—A contract for the delivery at a future time of personal property, which the seller has not on hand when the contract is made, nor any means of getting it, is not void for illegality. *Clark vs. Foss*, 540.
5. SECRET INTENTION.—The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal. *Id.*
6. MUTUAL INTENT.—The intent that such a transaction should be a mere

CONTRACTS—*Continued.*
betting on the market, without any expectation of actual performance, must be mutual, and constitute an integral part of the contract, in order to render it invalid. *Id.*
7. If the contracts were valid in their inception and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, by payment of differences, instead of by actual delivery, cannot make them void for illegality. *Id.*
8. Many authorities cited and commented upon. *Id.*

CONTRIBUTORY NEGLIGENCE—*See* ADMIRALTY, 16—NEGLIGENCE, 1.

CORPORATION—*See* MUNICIPAL CORPORATIONS—INSURANCE—BANKRUPTCY, 7.
1. FOREIGN CORPORATION.—A foreign corporation has the right to hold and occupy as lessee or otherwise, such property as is necessary or convenient for the transaction of its business. *Northern Transportation Co. vs. Chicago*, 45.
2. EMINENT DOMAIN.—A municipal corporation has a right to enter upon a street, or tunnel under a street, for the purpose of making public improvements; and also has a right for the same purpose to enter upon, occupy and obstruct a portion of the river in front of plaintiff's lot, and construct a coffer-dam there if it was necessary in order to enable it to construct the tunnel. *Id.*
3. NEGLIGENCE.—Under such circumstances, however, the city would be liable for damages if it did not use due skill, care and dispatch, so as not to unnecessarily interfere with private property. *Id.*
4. TIME OF OCCUPATION.—The fact that the street and river were used for a great length of time makes no difference, as the injury, if any, is only greater in degree, provided however, that they were not used longer than was necessary. *Id.*
5. DAMAGES FOR NEGLIGENCE.—The city would be liable for damages caused by the sinking of a wall by reason of the excavation, if they could be charged with negligence. *Id.*
6. SINKING—CAUSED BY WEIGHT OF WALL.—But if such sinking was caused not by the weight of earth but by the superinduced pressure of the weight of the wall, there would be no liability. *Id.*
7. STATE TAX ON INTER-STATE TRANSPORTATION.—The penalties against a foreign corporation prescribed by the seventh section of the Indiana statute of 21st December, 1872, for omitting to make return of its receipts for transportation through the state cannot be enforced. *State of Indiana vs. The American Express Co.*, 227.
8. A tax by a state upon transportation through the state is an interference with inter-state commerce, which it is not competent for a state to restrict. *Id.*

COSTS—*See* BANKRUPTCY, 27-29.

COUNSEL—*See* BANKRUPTCY, 7.

CREDITOR'S BILL.
1. If it is apparent that there was no *bona fide* attempt made by the officer to find property to satisfy the judgment, a creditor's bill will be dismissed. *Bassett vs. Orr*, 296.
2. As the basis for a creditor's bill, an execution upon the judgment should be in good faith issued, and should be returned unsatisfied by the

CREDITOR'S BILL—*Continued.*

officer upon a reasonable and actual but ineffectual effort to find property. If the return of the officer on its face shows a failure in this respect then there is no foundation for equity jurisdiction. *Id.*

3. The Marshal is not bound to hold the execution the sixty days it might run before making a return, as the remedy at law might be exhausted before the expiration of the return day, and in that case the execution could be immediately returned. *Id.*

4. RETURN OF MARSHAL PRESUMED TRUE.—When the return of the Marshal is on its face complete and sufficient, the presumption is that the return is true and that the officer performed his duty; such presumption is not overcome by the fact that he returned the process on the day he received it, as he might have previous knowledge of the judgment debtor's property and situation. *Id.*

5 BURDEN OF PROOF.—The burden of showing the return false is upon the defendant. *Id.*

6. The return is a sufficient basis for a creditor's bill. *Id.*

7. EVIDENCE.—The falsity of the return may be shown by establishing that the debtor had property liable to execution and which could have been levied on to pay the debt. *Id.*

8. AMOUNT OF PROPERTY.—It is not necessary that there should be property sufficient to fully satisfy the execution in order to defeat the remedy in equity, and if there be property sufficient to satisfy a considerable portion of the debt a creditor's bill ought not to be sustained until such property is exhausted. *Id.*

9. In this case, property being mortgaged and defendant's affairs complicated, the bill was sustained. *Id.*

CRIMINAL LAW—*See* REVENUE LAW.

1. INDICTMENT FOR UNLAWFULLY WITHHOLDING PENSION UNDER § 5485 U. S. REVISED STATUTES.—In order to convict under this section it must be shown by the evidence:

1st. That the person from whom it is alleged that the whole or any part of a pension is wrongfully withheld is a pensioner of the United States.

2d. That the amount alleged to be wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner or claimant.

3d. That the person charged with the wrongful withholding was an agent or attorney of the pensioner, instrumental in prosecuting the pensioner's claim for pension, or if not an agent or attorney, was a person through whose instrumentality the claim was prosecuted.

4th. That the whole or part of the pension claim allowed and due such pensioner or claimant, was wrongfully withheld from the pensioner or claimant, by such agent or attorney, or other person instrumental in prosecuting the claim for pension. *U. S. vs. Howard*, 56.

2. AGENCY—WHAT CONSTITUTES.—The mere fact that a banker or other person agrees to collect a check paid to a pensioner by a pension agent, does not thereby make him an agent for the prosecution of the claim for the pension, but only an ordinary agent for the collection of the check, and if the pensioner accepts a certificate of deposit, in lieu of

CRIMINAL LAW—*Continued.*

the check of a pension agent, the ordinary relation of debtor and creditor is created. *Id.*

3. CONSPIRACY.—A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense. *U. S. vs. Goldberg*, 175.

4. PROOF.—To establish the guilt of a party accused of this crime it must be proved.

(1.) That the conspiracy was formed to commit the offense described in the indictment.

(2.) That the accused were parties to the conspiracy.

(3.) That to effect the object of the conspiracy, one or more of the parties thereto did one or more of the acts alleged. *Id.*

5. ACT OF ONE ONLY.—An act done by only one of the parties to effect the object, binds each and all the parties to the conspiracy and completes the offense as to all; for in that case the act of one becomes the act of all. *Id.*

6. PRECISE TIME NOT ESSENTIAL.—It is not essential that the conspiracy be shown to have been formed at the precise time or times alleged in the indictment. *Id.*

7. CIRCUMSTANTIAL EVIDENCE—may be sufficient to prove a conspiracy. *Id.*

8. TESTIMONY OF ACCOMPLICES—though competent, should be received and scrutinized with great caution. *Id.*

9. A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, does not constitute the offense. *Id.*

10. ACTS OF CO-CONSPIRATORS.—When the existence of the conspiracy and the connection of the defendant therewith is established by independent evidence, he is bound by the acts and declarations of his co-conspirators. *Id.*

11. The law of conspiracy fully discussed. *Id.*

12. INSANITY.—Upon an inquisition of insanity upon a motion for a new tial after verdict of guilty of perjury, the question is the same as if raised when the prisoner was called to plead. *U. S. vs. Lancaster*, 440.

13. Upon such an inquisition the question to be decided is, whether the defendant was incapable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it. *Id.*

14. BURDEN OF PROOF.—The burden of proof of insanity is upon the defendant, yet he should have the benefit of any reasonable doubt. *Id.*

15. PRACTICE.—In an inquisition of insanity the counsel for the prisoner should open and close the case to the jury. *Id.*

16. REVENUE LAW—INDICTMENT—WHAT PROOF NECESSARY.—It is not necessary to prove that the precise quantities were removed, in an indictment for removing distilled spirits on which the tax had not been paid; proof of any quantity removed, less or more than is alleged, upon which the tax has not been paid is sufficient. *U. S. vs. Nunnemacher*, 111.

17. TIME OF REMOVAL.—It is not indispensable to the prosecution that the removal of the spirits took place at the precise times stated; but it must

CRIMINAL LAW—*Continued.*
be at, or about the time stated, and evidence of removals considerably anterior will be inadmissible. *Id.*
18. REMOVAL AND CONCEALMENT.—In a count of an indictment for removal and concealment, conviction may be had if removal is proved, though concealment is not shown. *Id.*
19. PROOF.—If a person in interest in the business of the distillery, for himself, either alone or with others, directed, prescribed, ordered or set on foot the alleged removal or removals of spirits, or aided or abetted therein, he may be convicted of such removal or removals, although he may not have been personally present at the time. *Id.*
20. PRINCIPAL AND AGENT IN CRIME.—Where a person with unlawful purpose or intent designs the commission of a criminal act, and to carry out that purpose or effect the unlawful object, another is employed to do the act, that act becomes the act of the principal, and he as well as the agent is criminally responsible. *Id.*
21. CONSPIRACY—WHAT CONSTITUTES.—A conspiracy is formed when two or more persons agree together to do that which is unlawful, and when one or more of the parties does any act to effect the object of such conspiracy. A mere agreement or combination to effect an unlawful purpose, not followed by any act, does not constitute the offense; there must be both the corrupt agreement or combination and an act done in pursuance thereof to make the punishable offense under the statute. *Id.*
22. A general discussion of the law on the question of conspiracy. Many authorities cited and commented upon. *Id.*
23. IDENTITY OF CONSPIRACY.—Is not destroyed by the connection at a subsequent time of new parties therewith. *Id.*
24. DUPLICITY IN INDICTMENT.—Under the United States Statute, § 3296, an allegation of the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, and the concealment thereof, is equivalent to alleging the concealment of spirits which have been removed, etc., and on which the tax had not been paid, and an indictment drawn as above is not bad for duplicity. *U. S. vs. Nunnemacher*, 129.
25. EQUIVALENT WORDS.—In drawing an indictment it is not necessary that the exact words of the statute be used, if their precise equivalent is expressed, and the words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of." *Id.*
26. CERTAINTY IN STATEMENT OF CONSPIRACY.—Certainty to a common intent is sufficient. *Id.*
27. The allegation that the tax on the spirits "had not been paid" is sufficient without an allegation that it "was still due and owing." *Id.*
28. The time when the spirits were distilled is not material. *Id.*
29. Many cases cited and commented upon. *Id.*

CUMULATIVE REMEDY—*See* ADMIRALTY, 9.

DAMAGES—*See* ADMIRALTY, 18, 21—MEASURE OF DAMAGES.

DEED—*See* REAL ESTATE.

DEPOSITIONS—*See* EVIDENCE.

DEMURRAGE—*See* ADMIRALTY, 18.

DISCHARGE—*See* BANKRUPTCY.

DISTILLERS—*See* REVENUE LAW—CRIMINAL LAW.
DISTRIBUTION OF PROCEEDS—*See* ADMIRALTY—BANKRUPTCY.
DOWER—*See* MARRIED WOMEN.
EMINENT DOMAIN.

1. EMINENT DOMAIN.—A municipal corporation has a right to enter upon a street, or tunnel under a street, for the purpose of making public improvements; and also has a right for the same purpose to enter upon, occupy and obstruct a portion of the river in front of plaintiff's lot, and construct a coffer-dam there if it was necessary in order to enable it to construct the tunnel. *Northern Transportation Co. vs. Chicago*, 45.
2. NEGLIGENCE.—Under such circumstances, however, the city would be liable for damages if it did not use due skill, care and dispatch, so as not to unnecessarily interfere with private property. *Id.*
3. TIME OF OCCUPATION.—The fact that the street and river were used for a great length of time makes no difference, as the injury, if any, is only greater in degree, provided however, that they were not used longer than was necessary. *Id.*
4. DAMAGES FOR NEGLIGENCE.—The city would be liable for damages caused by the sinking of a wall by reason of the excavation, if they could be charged with negligence. *Id.*
5. SINKING—CAUSED BY WEIGHT OF WALL.—But if such sinking was caused not by the weight of earth but by the superinduced pressure of the weight of the wall, there would be no liability. *Id.*

EQUITY—*See* CREDITOR'S BILL —FORECLOSURE—MORTGAGE.

1. LIEN OF JUDGMENT—PRIORITY.—A judgment prior in point of time is paramount to a posterior judgment, even though the latter be first enforced, and the former is enforced by a bill in equity to which the owner of the second judgment is not made a party. *Howard vs. The M. & St. P. R. W. Co.*, 73.
2. It *seems*, however, that in such case a court of equity would allow the junior judgment creditor to redeem even after the statutory period for redemption had expired. *Id.*
3. EQUITABLE ENFORCEMENT OF CONTRACT.—When a contract cannot be enforced at law if there is any fund to which the creditor has a right to resort for the enforcement or payment of that contract, it will be followed by a court of equity. *Beckwith vs. City of Racine*, 142.
4. Where a municipal corporation is legislated out of existence, and its territory assigned to other municipal corporations, the latter must pay the existing debt of the former in the ratio of the amount of territory each obtained. *Id.*
5. CONFLICT BETWEEN DIFFERENT CLAUSES IN LIFE INSURANCE POLICY.—Two clauses in such a policy, one "that no failure to pay any premium after the first should work a forfeiture of the entire policy, but the whole sum should be reduced in ratio to the number of premiums paid," and the other, that on failure to pay interest on unpaid policy notes, the policy should cease and determine, are not in conflict. *Nettleton vs. St. Louis Life Ins. Co.*, 293.
6. SEMBLE.—That equity might relieve. *Id.*
7. CIRCUITY OF ACTION.—When a court of equity obtains control of a fund and the parties entitled to it, it will at once place the money where it will ultimately go. *Thomson vs. Bradford*, 351.

EQUITY—*Continued.*

8. PRIORITY OF INSTALLMENTS OF MORTGAGE DEBT—has its foundation in the rule governing the application of payments, and does not app y to mortgage notes gives to secure indorsements. *Id.*

ESTOPPEL.

1. A party by neglect of an ordinary duty, as to look after his interest for an unreasonable length of time, is presumed to have approved of the management of the person having it in charge, and by such gross neglect is estopped from denying the existence of the authority exercised by the party claiming to represent him. *In re Jewett*, 328.

EVIDENCE—*See* CREDITOR'S BILL, 7.

1. PROOF OF HANDWRITING—VARIANCE IN SIGNATURE.—A variance in a signature is not necessarily proof of its being a forgery. Dissimilitude may be occasioned by a variety of circumstances, by the state of health and spirits of the writer, by the materials, by his position, or by his hurry or care. *Risley vs. The I., B. & W. Railway Co.*, 408.
2. WEIGHT OF EVIDENCE.—If a witness swears that he was present and saw a party sign a disputed instrument of writing, his evidence ought to out weigh the statement of another (both witnesses being equally credible) who testifies that he is acquainted with the handwriting of the alleged signer and that he does not believe the signature to be genuine. *Id.*
3. EFFECT OF STATE STATUTES.—A party to an action at law cannot be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized, and the production of books and writings must be enforced according to modes of procedure not deriving their origin from state statutes or practice. *Easton vs. Hodges*, 324.
4. CONFLICT OF LAWS.—In cases where Congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued, such legislation should be followed, although opposed to the forms and mode of proceeding prevailing in the state courts and established by state statutes. *Id.*

EXECUTION—*See* BANKRUPTCY, 32—CREDITOR'S BILL, 3.

EXEMPTION—*See* BANKRUPTCY, 22-24—MARSHALLING OF ASSETS.

1. STOCK IN TRADE.—Under the laws of Wisconsin, exemptions will not be allowed from the stock in trade, or from articles simply bought for exchange and which are not "used and kept for the purpose of carrying on the trade or business." *Ex parte Robinson*, 125.
2. Decisions of the Supreme Court of Wisconsin as to exemptions commented upon. *Id.*
3. HOMESTEAD EXEMPTION—In Wisconsin, does not extend to a business block, used as a dwelling. The question is not determined by occupation, but by the character and construction of the building. *In re Lammer*, 269.
4. If there is a dwelling house and a store upon the same lot, the assignee can set off the former as a homestead. *Id.*
5. DIVISION OF BUILDING.—The court will not divide a building and assign the bankrupt a part occupied by him. *Id.*

FEES—*See* BANKRUPTCY, 27-29.

FORECLOSURE.

1. JURISDICTION—FORECLOSURE BY ASSIGNEE.—Under the act of March 3, 1875, the United States Circuit Courts have jurisdiction of a bill to foreclose a mortgage in behalf of a non-resident assignee of such mortgage, though the assignor could not, by reason of citizenship, have filed such bill, *Seckel vs. Backhaus*, 354.
2. FORECLOSURE AGAINST MARRIED WOMEN—PERSONAL DECREE.—A personal decree will not be granted against a married woman who joins her husband in a note and gives a mortgage on her real estate to secure its payment, when the mortgage is foreclosed, and on sale the premises fail to bring enough to pay the note. *The Pawtucket Institution vs. Bowen*, 358.
3. PERSONAL LIABILITY OF MARRIED WOMEN.—A married woman cannot be held liable personally, even under the law as it now stands, unless it is made to appear that the debt contracted was for her personal benefit and about her personal interests, or for the purpose of protecting her personal estate, or that she became surety for her husband. *Id.*

FOREIGN CORPORATION—*See* CORPORATION.

FRAUD—*See* BANKRUPTCY, 58-61.

FRAUDULENT CONVEYANCE—*See* BANKRUPTCY.

FRAUDULENT PREFERENCE—*See* BANKRUPTCY.

FRAUDULENT SALE.

1. A sale by a retail dealer of his entire stock at once is presumably fraudulent, and the presumption of fraud arising from the unusual nature of such a sale can only be overcome by proof on the part of the buyer, that he used all reasonable means to ascertain that the sale was an honest one. *Main vs. Glen*, 86.
2. IGNORANCE OF INTENTION.—It is not enough to show that the buyer did not know that the seller's intentions were to defraud his creditors. *Id.*

GAMING CONTRACTS—*See* WAGER CONTRACTS.

GENERAL AVERAGE—*See* ADMIRALTY, 21.

GUARANTY—*See* BANKRUPTCY, 34.

HANDWRITING—*See* EVIDENCE, 1.

HOMESTEAD—*See* BANKRUPTCY, 22-24, 56—EXEMPTIONS.

HUSBAND AND WIFE—*See* MARRIED WOMEN.

INADEQUACY OF CONSIDERATION—*See* CONSIDERATION.

INDICTMENT—*See* CRIMINAL LAW.

INFRINGEMENT—*See* PATENT.

INSANITY.

1. Upon an inquisition of insanity upon a motion for a new trial after verdict of guilty of perjury, the question is the same as if raised when the prisoner was called to plead. *U. S. vs. Lancaster*, 440.
2. Upon such an inquisition the question to be decided is, whether the defendant was incapable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it. *Id.*

INSANITY—*Continued.*

3. BURDEN OF PROOF—of insanity is upon the defendant, yet he should have the benefit of any reasonable doubt. *Id.*
4. PRACTICE.—In an inquisition of insanity the counsel for the prisoner should open and close the case to the jury. *Id.*
5. SALE OF LUNATICS' ESTATE.—In Wisconsin, where a proper case is made in a petition to the County Court, for a license to sell the estate of a lunatic, the power of the court is set in motion and it has jurisdiction of the case; and the fact that the court had decided erroneously as to notice, etc., cannot collaterally affect the rights of a *bona fide* purchaser under the sale decreed by the court. *Mohr vs. Manierre*, 419.
6. CONFLICT OF LAWS.—As to general principles of law the Federal Court has the right to follow its own views, and is not bound by the decisions of the state courts. *Id.*
7. JURISDICTION OF COURT OF LIMITED AUTHORITY.—Where the jurisdiction of a court of special authority appears upon the record, its action and decision can no more be collaterally inquired into than can the action and decision of a court that has authority over all questions and controversies. *Id.*
8. LUNATIC MAY BE ADJUDGED BANKRUPT.—A party under guardianship as a lunatic may be adjudged a bankrupt against the consent of his guardian. *In re Weltzel*, 289.
9. LUNATIC CAN NOT COMMIT ACT OF BANKRUPTCY.—An insane person can not commit an act of bankruptcy. *Id.*

INSURANCE.

1. CONFLICT BETWEEN DIFFERENT CLAUSES IN LIFE INSURANCE POLICY.—Two clauses in such a policy, one "that no failure to pay any premium after the first should work a forfeiture of the entire policy, but the whole sum should be reduced in ratio to the number of premiums paid," and the other, that on failure to pay interest on unpaid policy notes, the policy should cease and determine, are not in conflict. *Nettleton vs. St. Louis Life Ins. Co.*, 293.
2. SEMBLE.—That equity might relieve. *Id.*
3. PAYMENT BY INSURER NOT INDISPENSABLE BEFORE FILING LIBEL.—Where a libel is brought by the underwriters for the the loss of a vessel, they having paid the loss and claiming to be subrogated to the rights of the insured it is not material whether or no the money has actually been paid by them before the filing of the libel, if it was the *bona fide* intention of the owner to abandon. *The Manistee*, 35.
4. FOREIGN CORPORATIONS—NON COMPLIANCE BY AGENT WITH STATUTE OF STATE.—Where an agent of a foreign insurance company, not authorized to make contracts for the company, but only to receive money, or proposals, or premium notes, and forward them to the company for its action, receives from a person in Indiana a proposal for insurance and a premium note, and forwards the same to the company in Illinois, the fact that the agent has failed to comply with the requirements of the statute of Indiana regarding foreign insurance companies doing business in that state, constitutes no defense to a suit brought upon such note. *Lamb vs. Bowser*, 372.
5. CONTRACT—WHEN VALID.—This is not a contract made by the agent of a foreign corporation, within the meaning of the statute declaring

INSURANCE—*Continued.*
that foreign corporations shall not enforce, in any of the courts of the state, contracts made by their agents before a compliance with the provisions of the statute, but the contract was made with the company itself, the agent being simply a conduit. *Id.*
6. SEMBLE.—A policy of insurance issued upon the receipt of such proposal and premium note, to the maker of the note, would be valid, and could be enforced against the company. *Id.*
7. BOND OF INSURANCE AGENT.—In Indiana it is not essential to the validity of the bond of the agent of an insurance company that he should have previously filed in the Circuit Court the papers required by the state statute. *U. S. Life Ins. Co. vs. Adams*, 30.
8. LOCATION OF AGENCY.—The fact that the agency is not established in any particular county, does not avoid the obligation of the sureties. *Id.*
9. LEX LOCI CONTRACTUS.—Where an application for insurance on certain property, and a note and sum of money, that constituted the premium, were sent from Indiana, by an agent of the company to the home office in Illinois, and were examined and accepted by the proper officer; Held, that the contract was made in Illinois and must be governed by the law of that state. *Lamb vs. Bowser*, 315.
10. The fact that the company and its agent had not complied with the Indiana statute does not invalidate the policy. *Id.*
11. CONSTITUTIONAL LAW.—It is not competent for the legislature of one state to declare that its citizens shall not be allowed to make such contracts as they please, out of the state. *Id.*

JUDGMENT—*See* LIEN OF JUDGMENT—BANKRUPTCY—EQUITY.

JURISDICTION—*See* BANKRUPTCY, 49.
1. THE U. S. CIRCUIT COURT—has jurisdiction of a suit upon a supersedeas bond given in that court, independent of the citizenship of the parties. *Seymour vs. Phillips & Colby Co.*, 460.
2. EFFECT OF RULE OF U. S. SUPREME COURT.—A rule established by the United States Supreme Court in pursuance of law, becomes, essentially, a part of the law itself. *Id.*
3. JURISDICTION OF COURT OF LIMITED AUTHORITY.—Where the jurisdiction of a court of special authority appears upon the record, its action and decision can no more be collaterally inquired into than can the action and decision of a court that has authority over all questions and controversies. *Mohr vs. Manierre*, 419.
4. FORECLOSURE BY ASSIGNEE.—Under the act of March 3, 1875, the United States Circuit Courts have jurisdiction of a bill to foreclose a mortgage in behalf of a non-resident assignee of such a mortgage, though the assignor could not, by reason of citizenship, have filed such bill. *Seckel vs. Backhaus*, 354.
5. IN BANKRUPTCY.—A suit to set aside a contract upon grounds created and established by the Bankrupt Law, is one over which the Federal Courts have jurisdiction, and these courts will entertain jurisdiction to prevent their officers being placed in unreasonable jeopardy. *Main vs. Glen*, 36.
6. PRIOR ADJUDICATION IN ANOTHER DISTRICT.—Proceedings in bankruptcy in one District Court against a firm, constitute no bar to similar proceedings in another district against another firm, some of whose

JURISDICTION—*Continued.*

members were also members of the former firm. *In re Jewett*, 473.

7. PROMISSORY NOTE.—JURISDICTION OF U. S. COURT.—The Statutes of Indiana make all promissory notes negotiable so far as to vest the property in each indorsee successively; but unless a note is made payable to order or bearer at a particular bank, whatever equity the maker was entitled to against the payee he may assert against any indorsee. Under such a statute the United States Courts have no jurisdiction of an action by an assignee of a note not made payable at a bank, as such a note is not a "promissory note negotiable by the law merchant." *Gregg vs. Weston.*

8. The statutes of a state enter into and become part of a note made in that state. *Id.*

9. SUIT BY ASSIGNEE.—An assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the bankrupt act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations. *Cady vs. Whaling*, 430.

10. FRAUD.—Courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter. *Id.*

11. An assignee in bankruptcy stands in the same position as a judgment creditor and can bring a suit in equity to set aside a fraudulent conveyance. *Id.*

12. BANKING ASSOCIATIONS.—The 10th clause of section 629 of the Revised Statutes of the United States, giving U. S. Courts jurisdiction "of all suits by or against any banking association established in the district for which court is held under any law providing for national banking associations" does not invest said courts with exclusive jurisdiction over this class of corporations. Their jurisdiction is only concurrent with that of the state courts. *Pettibon vs. Noble*, 449.

13. If suit is brought against such banking association in a state court, it has no right to remove the cause to the Federal Court. *Id.*

LEX LOCI CONTRACTUS.

1. Where an application for insurance on certain property, and a note and sum of money, that constituted the premium, were sent from Indiana, by an agent of the company to the home office in Illinois, and were examined and accepted by the proper officer; Held, that the contract was made in Illinois and must be governed by the law of that state. *Lamb vs. Bowser*, 315.

2. The fact that the company and its agent had not complied with the statute of Indiana does not invalidate the policy. *Id.*

LICENSE.

1. PATENT—RIGHTS OF LICENSEE FROM ONE OF SEVERAL OWNERS.—A license by one patentee to use the thing patented, clothes the licensee with the right to use it, and he becomes liable for the contract price for the license. *Dunham vs. The Indianapolis & St. Louis R. R. Co.*, 223.

2. Patentees are tenants in common of the right. *Id.*

LIEN OF JUDGMENT.

1. PRIORITY.—A judgment prior in point of time is paramount to a pos-

LIEN OF JUDGMENT—*Continued.*
terior judgment, even though the latter be first enforced, and the former is enforced by a bill in equity to which the owner of the second judgment is not made a party. *Howard vs. The M. & St. P. R. W. Co.*, 73.
2. It *seems*, however, that in such case a court of equity would allow the junior judgment creditor to redeem even after the statutory period for redemption had expired. *Id.*

LIENS—*See* BANKRUPTCY, 45—ADMIRALTY, 1-5, 22.
1. STATUTORY LIEN.—A lien which derives its existence wholly from a state statute, and the continuance of which is by such statute made dependent upon the commencement of a suit in the state court within a prescribed period, is not preserved as a valid living incumbrance upon the bankrupt's estate, when no suit has been commenced in the state court and no step taken in the bankrupt court equivalent to such suit within the time limited by the statute for the preservation and enforcement of the lien. *In re Brunquest*, 208.
2. Such a lien, liable to lapse from omission to do an act required to be done for its preservation by the statute creating it, is not kept alive and continuing by virtue alone of the commencement of bankruptcy proceedings. *Id.*
3. The failure of lien claimants to present their claims or liens for recognition and enforcement to the bankrupt court within the period limited by the statute, bars such claims as effectually as omission to bring suit if the bankrupt were solvent. *Id.*
4. LIEN.—A creditor seizing property under process of attachment issued from the state court within four months prior to the commencement of bankruptcy proceedings, is not considered as having a secured claim, and may be counted in estimating the number and amount of the creditors of the bankrupt. *In re Broich et al.*, 303.
5. Such a creditor has only an inchoate, conditional lien, and not a fixed, absolute, vested and continuing one, as intended by the statute. *Id.*

LUNATIC—*See* INSANITY.

MARITIME LIEN—*See* ADMIRALTY.

MARRIED WOMEN—*See* MARSHALLING ASSETS, 3—BANKRUPTCY, 55.
1. EQUITABLE RIGHTS OF A WIFE IN THE MORTGAGED ESTATE OF HER HUSBAND.—In Indiana a wife who has mortgaged her individual interest in her husband's lands to secure his individual debt, has an equitable right to require that her interest shall not be sold, if her husband's interest will sell for enough to satisfy the debt. *The Thames Loan and Trust Co. vs. Julian*, 446.
2. The wife's inchoate right in her husband's lands, contingent upon his death, or the extinguishment of his title by judicial sale, will be properly guarded by the courts. *Id.*
3. Indiana Act of March 11, 1875 (1 Davis, R. S. 1875, 554), construed. *Id.*
4. FORECLOSURE AGAINST MARRIED WOMEN—PERSONAL DECREE.—A personal decree will not be granted against a married woman who joins her husband in a note and gives a mortgage on her real estate to secure its payment, when the mortgage is foreclosed, and on sale the premises fail to bring enough to pay the note. *The Pawtucket Institution vs. Bowen*, 358.

MARRIED WOMEN—*Continued.*

5. PERSONAL LIABILITY OF MARRIED WOMEN.—A married woman cannot be held liable personally, even under the law as it now stands, unless it is made to appear that the debt contracted was for her personal benefit and about her personal interests, or for the purpose of protecting her personal estate, or that she became surety for her husband. *Id.*

6. GIFT OF PERSONAL PROPERTY BY INSOLVENT HUSBAND TO WIFE,—Without any visible change of possession, does not constitute an adverse interest in the wife so as to compel the institution of separate proceedings for the purpose of litigating the rights of the parties. *In re Pierce & Whaling*, 426.

7. SUMMARY JURISDICTION OF BANKRUPTCY COURT.—On a petition by the assignee of the husband for the possession of the property, an affidavit by the husband, that the property is in possession of his wife is not a sufficient answer; and the bankruptcy court can compel the property to be turned over to the assignee. *Id.*

8. PRACTICE.—Upon such a petition by the assignee, the court should require the bankrupt to answer. *Id.*

MARSHALLING ASSETS—*See* BANKRUPTCY, 53.

1. MODE OF MARSHALLING.—A creditor who held several judgment notes against a person afterwards declared bankrupt, and also mortgages and two insurance policies as collateral security, a few days before the filing of the petition in bankruptcy, caused judgment to be entered upon the notes, and executions to be issued thereon. *Held*, that the court had power to so marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund. *In re Sauthoff & Olson*, 167.

2. MORTGAGE LOANED BY THIRD PARTY TO BANKRUPT.—This rule would not extend to a mortgage loaned by a third party to the bankrupt, to be used as a security for the payment of the judgment notes. The rights of the assignor of such a mortgage would be superior to those of the assignee in bankruptcy. *Id.*

3. POLICY PAYABLE TO WIFE.—The same principle applies to the case of a policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee. But the mortgage of the bankrupt and wife, to the petitioner, and the policy of insurance payable to the bankrupt in this case, fall within the general doctrine of marshalling securities, and the petitioner to that extent is to be regarded as doubly secured, and should be required to first exhaust his remedy on them, and be allowed the balance out of the general fund in court. *Id.*

4. HOMESTEAD.—The fact that a part of the property is a homestead does not change the rule requiring a party having security on two funds, to first exhaust his remedy upon the fund he alone was secured upon, where there is another party having security on the other alone. *Id.*

MEANDER LINES—*See* RIPARIAN RIGHTS.

MEASURE OF DAMAGES.

1. REFUSAL TO PLACE JUDGMEMT ON TAX LIST.—The highest damages which will be allowed in the United States Courts, against the Supervisors of a town for a refusal to put a judgment on the tax list, even

MEASURE OF DAMAGES—*Continued.*
though a mandamus shall have issued, will not exceed a counsel fee and costs. *Newark Savings Institution vs. Panhorst*, 99.

MINISTERIAL ACT—*See* BANKRUPTCY, 30.

MORTGAGE—*See* ADMIRALTY—CHATTEL MORTGAGES—BANKRUPTCY, 54.

1. PRIORITY OF INSTALLMENTS OF MORTGAGE DEBT—Has its foundation in the rule governing the application of payments, and does not apply to mortgage notes given to secure indorsements. *Id.*
2. EFFECT OF PAROL AGREEMENT UPON ABSOLUTE DEED.—A parol statement of a mortgagee when foreclosing that he "only commenced the suit for the purpose of perfecting the title; that the plaintiff's interests should not be affected by it; and that he would carry out a previous arrangement made that he would pay the debt out of the rents and profits," is not of such a nature as would make an absolute deed obtained by the mortgagee on foreclosure a conditional one, and would not render such a deed a continuation of the mortgage. *Howland vs. Blake*, 40.
3. PAROL EVIDENCE TO CHANGE TERMS OF WRITTEN INSTRUMENT.—The rule which allows parol evidence to be introduced to show that a deed absolute on its face is a mortgage, should not be enlarged, but should be strictly construed, and the evidence should be very strong. *Id.*
4. EQUITABLE RIGHTS OF A WIFE IN THE MORTGAGED ESTATE OF HER HUSBAND.—In Indiana a wife who has mortgaged her individual interests in her husband's lands to secure his individual debt, has an equitable right to require that her interest shall not be sold, if her husband's interest will sell for enough to satisfy the debt. *The Thames Loan and Trust Co. vs. Julian*, 446.
5. The wife's inchoate right in her husband's lands, contingent upon his death, or the extinguishment of his title by judicial sale, will be properly guarded by the courts. *Id.*
6. Indiana Act of March 11, 1875 (1 Davis, R. S. 1875, 554), construed. *Id.*
7. RENTS OF MORTGAGED PROPERTY.—In Indiana the mortgagor of property, being entitled to possession, is entitled to the rents, and if he become a bankrupt his assignee succeeds to the right for the benefit of his unsecured creditors. *Hunter vs. Hays*, 362.
8. When mortgaged premises are insufficient to pay a mortgage debt, the mortgagee would be entitled to an order applying the rents to the payment of his debt, but if he makes no demand for the rents, and takes no steps to have the same applied to his debt, the mortgagor can hold them. *Id.*

MUNICIPAL CORPORATIONS.

1. CONTRACTS WITH MUNICIPAL CORPORATIONS—AUTHORITY OF MUNICIPAL OFFICERS TO MAKE TIME CONTRACTS.—The city of Chicago has not the right to contract for lighting the streets and public buildings for a term of years. *Garrison vs. Chicago*, 180.
2. SEMBLE.—If the other contracting party has gone to great expense in pursuance of such a contract, a strong equity may arise in his favor. *Id.*
3. The officers of a municipal corporation should be held to a rigid accountability in the discharge of their duty in regard to contracts of such

MUNICIPAL CORPORATIONS—*Continued.*

corporation; and in all cases of contracts to run for years, the authority to make them should be clear, because they involve pecuniary liability which will be a tax upon future property owners of the city. *Id.*

4. LEGISLATIVE CONTROL.—Counties and towns are, as to their corporate existence, completely within the control of the Legislature. They may be changed, altered, enlarged, diminished or extinguished, by the mere act of the Legislature. *Beckwith vs. City of Racine*. 142.

5. When a town is thus obliterated, an action at law cannot be maintained against it, for it cannot be served by process through its officers, for although the officers of a municipal corporation hold until their successors are elected and qualified, still where no successors could be elected, they cease to hold. *Id.*

6. A contract entered into previously, is not destroyed and annulled by the obliteration of the town, for the power of taxation still remains. It is only transferred to other corporations. *Id.*

7. EQUITABLE ENFORCEMENT OF CONTRACT.—When a contract cannot be enforced at law, if there is any fund to which the creditor has a right to resort for the enforcement or payment of that contract, it will be followed by a court of equity. *Id.*

8. Where a municipal corporation is legislated out of existence, and its territory assigned to other municipal corporations, the latter must pay the existing debt of the former in the ratio of the amount of territory each obtained. *Id.*

NAVIGATION—*See* ADMIRALTY.

NEGLIGENCE.

1. CONTRIBUTORY NEGLIGENCE.—In a collision where a fault is charged against one vessel, in relation to which the testimony is doubtful, and it appears by undisputed testimony that the fault of another is flagrant, the latter only will be held responsible, and the doctrine of contributory negligence will not apply. *The Mantstee*, 35.

2. FIRE—NEGLIGENCE.—Negligence cannot be inferred from the fact that a vessel is on fire. If the vessel were properly protected from fire, negligence must be proved. *The Buckeye*, 23.

NON JURIDICAL DAY—*See* BANKRUPTCY, 30.

NOTES, BILLS AND CHECKS—*See* ADMIRALTY, 2, 3.

1. PROMISSORY NOTE.—JURISDICTION OF U. S. COURT.—The Statutes of Indiana make all promissory notes negotiable so far as to vest the property in each indorsee successively; but unless a note is made payable to order or bearer at a particular bank, whatever equity the maker was entitled to against the payee he may assert against any indorsee. Under such a statute the United States Courts have no jurisdiction of an action by an assignee of a note not made payable at a bank, as such a note is not a "promissory note negotiable by the law merchant." *Gregg vs. Weston*, 360.

2. The statutes of a state enter into and become part of a note made in that state. *Id.*

3. FOREIGN CORPORATIONS—NON COMPLIANCE BY AGENT WITH STATUTE OF STATE.—Where an agent of a foreign insurance company, not authorized to make contracts for the company, but only to receive money, or proposals, or premium notes, and forward them to the com-

NOTES, BILLS AND CHECKS—*Continued.*

pany for its action, receives from a person in Indiana a proposal for insurance and a premium note, and forwards the same to the company in Illinois, the fact that the agent has failed to comply with the requirements of the statute of Indiana regarding foreign insurance companies doing business in that state, constitutes no defense to a suit brought upon such note. *Lamb vs. Bowser*, 372.

4. CONTRACT—WHEN VALID.—This is not a contract made by the agent of a foreign corporation, within the meaning of the statute declaring that foreign corporations shall not enforce, in any of the courts of the state, contracts made by their agents before a compliance with the provisions of the statute, but the contract was made with the company itself, the agent being simply a conduit. *Id.*

5. SEMBLE.—A policy of insurance issued upon the receipt of such proposal and premium note, to the maker of the note, would be valid, and could be enforced against the company. *Id.*

6. LEX LOCI CONTRACTUS.—Where an application for insurance on certain property, and a note and sum of money, that constituted the premium, were sent from Indiana, by an agent of the company to the home office in Illinois, and were examined and accepted by the proper officer; Held, that the contract was made in Illinois and must be governed by the law of that state. *Lamb vs. Bowser*, 315.

7. The fact that the company and its agent had not complied with the Indiana statute does not invalidate the policy. *Id.*

8. CONSTITUTIONAL LAW.—It is not competent for the legislature of one state to declare that its citizens shall not be allowed to make such contracts as they please, out of the state. *Id.*

9. THE LIABILITY OF A BANK TO WHOM COMMERCIAL PAPER IS SENT FOR COLLECTION.—A second bank receiving the paper from the first and collecting the money on it, is not liable to the owner of the paper. *Hyde vs. First National Bank*, 156.

10. On the deposit of a note with a bank for collection, a contract is implied between the owner and the bank, but this implied contract does not follow the note into the hands of the bank's collecting agents. *Id.*

11. The owner has no remedy against an agent of the collector. *Id.*

12. BANK CHECKS—DUTY OF HOLDER.—If payment of a check is not regularly demanded, and the bank fails after the time it should have been demanded, the loss falls on the holder. If the check is presented and not paid, notice of dishonor must be given the drawer, in order to charge him. *Farwell vs. Curtis*, 160.

13. The holder of a check cannot extend the time for which the drawer would be liable. *Id.*

14. DUTY OF HOLDER.—The drawer had a right to have his check paid on the day presented, if there are funds to meet it, and it is the duty of the holder to see that it was so paid, or protested; and if the holder accepts the check or draft of the bank in payment, in lieu of money, he must present and collect it the same day, or he is chargeable with *laches*. *Id.*

15. PRESENTATION BY MAIL.—If the payee sends a check by mail to the drawee for collection and return, he makes the drawee his agent, and

NOTES, BILLS AND CHECKS—*Continued.*

must bear any loss arising after the time when the check could have been presented by express or other usual method. *Id.*

16. ACCEPTING CERTIFICATION OF CHECK RENDERS COLLECTING BANK LIABLE.—A bank holding a check for collection and accepting the certification of the bank upon which it is drawn in lieu of payment, thereby assumes the risk of payment, and becomes liable to the owner for the amount of the check, with interest from the date of certification. *Essex County National Bank vs. Bank of Montreal*, 193.

17. DAMAGES PRESUMED.—It is not necessary that the owner prove his damages; the law presumes them. *Id.*

18. Nor is it essential that the bank on which the check was drawn, should have had the funds to pay it when presented. *Id.*

PARTNERSHIP.

1. ASSETS.—The assets of a firm in the possession of one of the partners are held in trust for the creditors of such firm, and if the partner in possession of them is afterwards adjudged bankrupt they are not assets in the hands of his assignee, and if he obtain possession of them he must account to the creditors of the firm for the proceeds. *Jones vs. Newsom*, 321.

2. WHAT CONSTITUTES.—Where a person holds himself out as a partner or permits another to hold him out as a partner, and thereby procures credit upon the strength of his supposed relation, he is on principles of natural justice held to be such partner. But knowledge or notice of his being so held out must be brought home to him, or there must be proof of circumstances which will authorize a court to presume notice, before he can be so charged. *In re Jewett*, 328.

PATENTS.

1. COMPLETENESS OF DESCRIPTION.—A mere suggestion that a given result can be obtained, is not patentable, and does not anticipate a patent by another. A mechanism or design must be described by which the suggested result is obtained. *Graham vs. Gammon*, 490.

2. WANT OF NOVELTY.—A patent issued upon such a suggestion, and without proper description of mechanism or design, does not constitute a good plea of want of novelty in a valid patent. *Id.*

3. The Graham device for rolling the finger beam in harvesters, sustained, and the vibratable link in the Sprague mower, held to be an infringement. *Id.*

4. RIGHTS OF LICENSEE FROM ONE OF SEVERAL OWNERS.—A license by one patentee to use the thing patented, clothes the licensee with the right to use it, and he becomes liable for the contract price for the license. *Dunham vs. The Indianapolis & St. Louis R. R. Co.*, 223.

5. Patentees are tenants in common of the right. *Id.*

6. RE-ISSUE.—The general principle in all re-issues is, that there can be nothing given in the re-issue which was not in the original specifications or drawings, although some minor amendments have been at times allowed. *Vogler vs. Semple*, 382.

7. CLAIM AND SPECIFICATIONS.—The claim must be for something so described in the specifications that any person of ordinary mechani-

PATENTS—*Continued.*

cal skill, or skill in the art covered by the patent, can, from the specifications, make a mechanism which will contain the claim. *Id.*

8. REMOVABLY HINGED TRUNK TRAY.—The Plumer patent for a removably hinged trunk tray is an infringement upon the Vogler patent. *Id.*

9. WHAT WILL BE CONSIDERED AN INFRINGEMENT.—Where it is stated in a patent, "We do not wish to confine ourselves exclusively to the V shaped projection, as any form that will prevent the core from turning, independent of the bush, will produce the same result," the patentees are not to be confined to the mere form, but any other form substantially like that, although there may be a change, would be within the terms of the patent. *Cornell vs. The Downer & Bemis Brewing Co. et al.*, 346.

10. EXTENT OF PATENTS.—Where there is a slight change in a machine, by which a new result is brought about, and which might be the subject of a patent, the invention should not be extended beyond the mere change, although the patent may be sustained, but where something elementary is discovered, and constitutes fairly a part of the invention of the patentee, no other inventor or manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator. *Id.*

PENSION—*See* CRIMINAL LAW.

PLEADING—*See* PRACTICE.

PRACTICE—*See* CREDITOR'S BILL—BANKRUPTCY.

1. BRINGING THE UNITED STATES INTO COURT.—The district attorney is not so far an officer of the court that the court can compel him to enter the appearance of the United States. *Fifth National Bank vs. Long*, 502.

2. The United States can be brought into court by the entry of an order that it shall plead, etc., within a given time, and the service of a copy of such order upon the proper representatives of the Government. *Id.*

3. CIRCUITY OF ACTION.—When a court of equity obtains control of a fund and the parties entitled to it, it will at once place the money where it will ultimately go. *Thomson vs. Bradford*, 351.

4. ENFORCING PREVIOUS DECREES OF STATE COURT.—Where, in an action in a state court, and order was made for the production of sworn copies of books and papers, which was disobeyed, and contempt proceedings instituted and an order made therein, and subsequently the cause was removed to the United States Court, the latter court will recognize and enforce the order of the state court in the contempt proceedings as appertaining to the action removed. *The Williams Reaper and Mower Co vs. Raynor*, 245.

5. APPEAL.—But if an appeal from the order in the state court has been taken to the Supreme Court, the United States Court will hold in abeyance proceedings for the enforcement of the order in question until the appeal is disposed of. *Id.*

6. The fact that the contempt proceedings in the state court were not entitled in the cause removed, but in the name of the people of the state, will not prevent the United States Court from reviewing the proceedings, if such proceedings were in reality in aid of the civil suit. *Id.*

PREMIUM—*See* INSURANCE.

PRINCIPAL AND AGENT—*See* CONSIGNOR'S LIEN—BANKRUPTCY, 11.

1. AGENT CANNOT ACQUIRE ADVERSE TITLE.—An agent to pay taxes on the lands of his principal, cannot acquire a valid tax deed on the same when they have been sold for taxes. *Curts vs. Cisna*, 260.
2. BONA FIDE PURCHASER.—Where an agent had acquired a tax deed on the lands of his principal, and had contracted to sell the same to a third party, who had no notice of the fraud, but his agent, in making the purchase, had such knowledge, and such purchaser had received a contract only for a deed, and had paid two-thirds of the purchase-money, *Held*, that the fact that the agent of such purchaser had had knowledge of such fraud, was not sufficient to affect his principal, unless the facts and circumstances were such as to show that he had the same in mind at the time of the transaction of the purchase; but that the right of such purchaser to call for a conveyance from the fraudulent grantee in the tax deed, was an equitable right merely, and that the right of the original owner being the oldest equity, must prevail. *Id.*
3. AGENCY—WHAT CONSTITUTES.—The mere fact that a banker or other person agrees to collect a check paid to a pensioner by a pension agent, does not thereby make him an agent for the prosecution of the claim for the pension, but only an ordinary agent for the collection of the check, and if the pensioner accepts a certificate of deposit, in lieu of the check of a pension agent, the ordinary relation of debtor and creditor is created. *U. S. vs. Howard*, 56.

PRIORITY—*See* BANKRUPTCY, 31, 32, 33.

PROMISSORY NOTES—*See* NOTES, BILLS AND CHECKS.

PUBLIC POLICY—*See* TELEGRAPH COMPANIES.

PUTS—*See* WAGER CONTRACTS.

RAILROAD COMPANIES.

1. EXCLUSIVE TELEGRAPH LINE—PUBLIC POLICY.—A contract between a railroad company and a telegraph company, that the former will allow no other telegraph company to construct a line along its road, is not inoperative as against public policy. *W. U. Tel. Co. vs. A. & P. Tel. Co.*, 367.
2. CONDEMNATION.—When a railroad is in the possession of a Receiver of the U. S. Court, a telegraph company can acquire no title to its right of way by condemnation proceedings in a state court. *Id.*

REAL ESTATE—*See* MORTGAGES—MARRIED WOMEN—FORECLOSURE.

1. BOUNDARY OF LAND BORDERING ON STREAM.—The law upon the subject of land bordering upon streams, is that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of Congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream. *Forsyth vs. Smale*, 201.
2. NON-NAVIGABLE LAKE.—Is governed by the same principles. *Id.*
3. LINE AS MEANDERED ON STREAM.—Where land is purchased bordering upon a non-navigable stream, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the

REAL ESTATE—*Continued.*

boundary of the land, the grant includes any land between the meandered line and the water. *Id.*

4. RENTS OF MORTGAGED PROPERTY.—In Indiana the mortgagor of property, being entitled to possession, is entitled to the rents, and if he become a bankrupt his assignee succeeds to the right for the benefit of his unsecured creditors. *Hunter vs. Hays*, 362.

5. When mortgaged premises are insufficient to pay a mortgage debt, the mortgagee would be entitled to an order applying the rents to the payment of his debt, but if he makes no demand for the rents, and takes no steps to have the same applied to his debt, the mortgagor can hold them. *Id.*

6. BONA FIDE PURCHASER—MUST HAVE OBTAINED THE LEGAL ESTATE.—A purchaser under a contract for a deed, though he may have paid all of the purchase-money is not protected as a *bona fide* purchaser; nor, if he has not obtained a conveyance of the legal estate, can he insist on the repayment of what he has paid on the contract as a condition of surrendering his claim. He must rely on the responsibility of his vendor. *Curtis vs. Cisna*, 260.

7. A purchaser without notice will not be protected against the superior equity of an adverse claim, and where a party had purchased what in reality was only a tax title, he must be held as having assumed the burden of maintaining that such tax title had extinguished the patent title, and which, as to him, was an adverse one. *Id.*

8. FOREIGN CORPORATION.—A foreign corporation has the right to hold and occupy as lessee or otherwise, such property as is necessary or convenient for the transaction of its business. *Northern Transportation Co., vs. Chicago*, 45.

9. EFFECT OF PAROL AGREEMENT UPON ABSOLUTE DEED.—A parol statement of a mortgagee when foreclosing that he "only commenced the suit for the purpose of perfecting the title; that the plaintiff's interests should not be affected by it; and that he would carry out a previous arrangement made that he would pay the debt out of the rents and profits," is not of such a nature as would make an absolute deed obtained by the mortgagee on foreclosure a conditional one, and would not render such a deed a continuation of the mortgage. *Howland vs. Blake*, 40.

10. PAROL EVIDENCE TO CHANGE TERMS OF WRITTEN INSTRUMENT.—The rule which allows parol evidence to be introduced to show that a deed absolute on its face is a mortgage, should not be enlarged, but should be strictly construed, and the evidence should be very strong. *Id.*

11. SALE OF LUNATIC'S ESTATE.—In Wisconsin, where a proper case is made in a petition to the County Court, for a license to sell the estate of a lunatic, the power of the court is set in motion and it has jurisdiction of the case; and the fact that the court had decided erroneously as to notice, etc., cannot collaterally affect the rights of a *bona fide* purchaser under the sale decreed by the court. *Mohr vs. Manierre*, 419.

RECEIVER—*See* CONTEMPT OF COURT.

1. RATIFICATION BY RECEIVER.—If the receiver ratifies a contract previously made with the company, the rights under such contract are

RECEIVER—*Continued.*

not affected by the foreclosure proceedings. *W. U. Tel. Co. vs. A. & P. Tel. Co.*, 367.

REMOVAL FROM STATE COURT.

1. A part of a controversy only cannot be removed, but the case must be so removed that it can be wholly determined. *Hervey vs. I. M. R. W. Co.*, 103.
2. FOREIGN CITIZENSHIP.—Foreign citizens, where they do not constitute the entire plaintiff or defendant cannot remove a suit, as the suits contemplated by the act of March 3, 1875, are those between citizens of one of the states of the Union on one side, and foreign states citizens or subjects on the other. *Id.*
3. NOMINAL PARTIES.—Where parties are merely nominal and have no actual interest then their citizenship will not affect the question of removal. *Id.*
4. CAUSES FOR REMOVAL.—In the removal of a cause the whole suit must be removed; a fragment of a suit cannot come to the Federal Court for trial, because a party interested in that fragment, or some single issue, is a citizen of another state from that of the plaintiff. *Carraher vs. Brennan*, 497.
5. A removal will only be allowed when the controversy is so completely a controversy between residents or citizens of different states, that its termination will settle the whole suit. *Id.*
6. It is not enough that citizens of different states are interested in the same issue or controversy, but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined; otherwise the right of removal is not given. *Id.*
7. ENFORCING PREVIOUS DECREES OF STATE COURT.—Where, in an action in a state court, an order was made for the production of sworn copies of books and papers, which was disobeyed, and contempt proceedings instituted and an order made therein, and subsequently the cause was removed to the United States Court, the latter court will recognize and enforce the order of the state court in the contempt proceedings as appertaining to the action removed. *The Williams Mower and Reaper Co. vs. Raynor*, 245.
8. APPEAL.—But if an appeal from the order in the state court has been taken to the Supreme Court, the United States Court will hold in abeyance proceedings for the enforcement of the order in question until the appeal is disposed of. *Id.*
9. The fact that the contempt proceedings in the state court were not entitled in the cause removed, but in the name of the people of the state, will not prevent the United States Court from reviewing the proceedings, if such proceedings were in reality in aid of the civil suit. *Id.*
10. ACT CONSTRUED.—The jurisdiction of a state court over a controversy rightfully in its possession, cannot be dislodged except by fully complying with the requirements of the acts of Congress authorizing the transfer of causes from the state to the federal tribunals. *Burdick vs. Hale*, 96.
11. INSUFFICIENCY OF BOND.—A bond given in pursuance of the act of March, 3, 1875, in regard to removal of causes from the state to the federal courts, in which the place where the penal sum should have been inserted is left blank is insufficient; for although an undertaking to

REMOVAL FROM STATE COURT—*Continued.*
pay an indefinite amount would have satisfied the act, no sum being named as a penalty, no liability is created. *Id.*
12. CONDITION OF BOND.—Where the act requires that the condition of the bond shall be that the party removing the suit will enter in the Circuit Court of the United States, on the first day of its next session, a copy of the record in such suit, and for paying all costs that shall be awarded by said Circuit Court, and the condition in the bond given, is that plaintiff shall file in the Circuit Court "copies of all process," such bond is insufficient. *Id.*
13. APT TIME.—A case pending in the Supreme Court of a state at the time the act of March 3rd, 1875, in regard to the removal of suits, was passed, and which was remanded from such Supreme Court for further proceedings, stands like a new cause, and consequently the right of removal may be claimed at or before the term at which the case can be tried. *Pettibon vs. Noble*, 449.
14. The defendants not being obliged to re-docket the case, are not bound to take affirmative action for a removal until the complainants had caused the case to be re-docketed, of which they are entitled to due notice. *Id.*
15 JURISDICTION OVER BANKING ASSOCIATIONS.—The 10th clause of section 629 of the Revised Statutes of the United States, giving U. S. Courts jurisdiction "of all suits by or against any banking association established in the district for which court is held under any law providing for national banking associations" does not invest said courts with exclusive jurisdiction over this class of corporations. Their jurisdiction is only concurrent with that of the state courts. *Id.*
16. If suit is brought against such banking association in a state court, it has no right to remove the cause to the Federal Court. *Id.*

RENTS—*See* MORTGAGES, 7.

RETURN OF OFFICER—*See* CREDITOR'S BILL, 4.

REVIEW—*See* BANKRUPTCY, 10.

RIOTERS—*See* CONTEMPT.

RIPARIAN RIGHTS.

1. BOUNDARY OF LAND BORDERING ON STREAM.—The law upon the subject of land bordering upon streams, is that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of Congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream. *Forsyth vs. Smale*, 201.
2. NON-NAVIGABLE LAKE.—Is governed by the same principles. *Id.*
3. LINE AS MEANDERED ON STREAM.—Where land is purchased bordering upon a non-navigable stream, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land, the grant includes any land between the meandered line and the water. *Id.*

REVENUE LAW.

1. INDICTMENT—WHAT PROOF NECESSARY.—It is not necessary to prove that the precise quantities were removed, in an indictment for remov-

REVENUE LAW—*Continued.*
ing distilled spirits on which the tax had not been paid; proof of any quantity removed, less or more than is alleged, upon which the tax has not been paid is sufficient. *U. S. vs. Nunnemacher*, 111.
2. TIME OF REMOVAL.—It is not indispensable to the prosecution that the removal of the spirits took place at the precise times stated; but it must be at, or about the time stated, and evidence of removals considerably anterior will be inadmissible. *Id.*
3. REMOVAL AND CONCEALMENT.—In a count of an indictment for removal and concealment, conviction may be had if removal is proved, though concealment is not shown. *Id.*
4. PROOF.—If a person in interest in the business of the distillery, for himself, either alone or with others, directed, prescribed, ordered or set on foot the alleged removal or removals of spirits, or aided or abetted therein, he may be convicted of such removal or removals, although he may not have been personally present at the time. *Id.*
5. PRINCIPAL AND AGENT IN CRIME.—Where a person with unlawful purpose or intent designs the commission of a criminal act, and to carry out that purpose or effect the unlawful object, another is employed to do the act, that act becomes the act of the principal, and he as well as the agent is criminally responsible. *Id.*
6. CONSPIRACY—WHAT CONSTITUTES.—A conspiracy is formed when two or more persons agree together to do that which is unlawful, and when one or more of the parties does any act to effect the object of such conspiracy. A mere agreement or combination to effect an unlawful purpose, not followed by any act, does not constitute the offense; there must be both the corrupt agreement or combination and an act done in pursuance thereof to make the punishable offense under the statute. *Id.*
7. A general discussion of the law on the question of conspiracy. Many authorities cited and commented upon. *Id.*
8. IDENTITY OF CONSPIRACY—Is not destroyed by the connection at a subsequent time of new parties therewith. *Id.*
9. DUPLICITY IN INDICTMENT.—Under the United States Statute, § 3296, an allegation of the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, and the concealment thereof, is equivalent to alleging the concealment of spirits which have been removed, etc., and on which the tax had not been paid, and an indictment drawn as above is not bad for duplicity. *U. S. vs. Nunnemacher*, 129.
10. EQUIVALENT WORDS.—In drawing an indictment it is not necessary that the exact words of the statute be used, if their precise equivalent is expressed, and the words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of." *Id.*
11. CERTAINTY IN STATEMENT OF CONSPIRACY.—Certainty to a common intent is sufficient. *Id.*
12. The allegation that the tax on the spirits "had not been paid" is sufficient without an allegation that it "was still due and owing." *Id.*
13. The time when the spirits were distilled is not material. *Id.*
14. Many cases cited and commented upon. *Id.*
15. CONSPIRACY.—A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry

REVENUE LAW—*Continued.*

into execution the object of the conspiracy, does not constitute the offense. *U. S. vs. Goldberg*, 175.

16. PROOF.—To establish the guilt of a party accused of this crime it must be proved.
    (1.) That the conspiracy was formed to commit the offense described in the indictment.
    (2.) That the accused were parties to the conspiracy.
    (3.) That to effect the object of the conspiracy, one or more of the parties thereto did one or more of the acts alleged. *Id.*
17. ACT OF ONE ONLY.—An act done by only one of the parties to effect the object, binds each and all the parties to the conspiracy and completes the offense as to all; for in that case the act of one becomes the act of all. *Id.*
18. PRECISE TIME NOT ESSENTIAL.—It is not essential that the conspiracy be shown to have been formed at the precise time or times alleged in the indictment. *Id.*
19. CIRCUMSTANTIAL EVIDENCE—may be sufficient to prove a conspiracy. *Id.*
20. TESTIMONY OF ACCOMPLICES—though competent, should be received and scrutinized with great caution. *Id.*
21. A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, does not constitute the offense. *Id.*
22. ACTS OF CO-CONSPIRATORS.—When the existence of the conspiracy and the connection of the defendant therewith is established by independent evidence, he is bound by the acts and declarations of his co-conspirators. *Id.*
23. The law of conspiracy fully discussed. *Id.*
24. ASSESSMENT BY COMMISSIONER OF INTERNAL REVENUE—STOCKHOLDERS.—A member of a stock-company, a corporation engaged in the business of distilling spirits, is a person interested in the business within the meaning of the law, and is individually liable for assessments, and the court will not entertain a bill to restrain them. *Kissinger vs. Bean*, 60.
25. Section 3224 U. S. Revised Statutes construed, and decisions thereon commented upon. *Id.*
26. To justify a court in holding that Section 3224 is not controlling in any case, a very clear case must be made, showing that the assessment by the Commissioner could not by any possibility be legal. *Id.*

RULE OF COURT—*See* JURISDICTION, 2.

SECRET AGREEMENT—*See* BANKRUPTCY.

STRIKERS—*See* CONTEMPT.

SUPERSEDEAS BOND—*See* JURISDICTION.

SUPERVISORS—*See* TOWN OFFICERS.

TAXES AND ASSESSMENTS—*See* CONSTITUTIONAL LAW, 1, 2—MEASURE OF DAMAGES.

TELEGRAPH COMPANY.

1. EXCLUSIVE TELEGRAPH LINE—PUBLIC POLICY.—A contract between a railroad company and a telegraph company, that the former will allow no other telegraph company to construct a line along its road, is

TELEGRAPH COMPANY—*Continued.*
not inoperative as against public policy. *W. U. Tel. Co. vs. A. & P. Tel. Co.*, 367.

2. CONDEMNATION.—When a railroad is in the possession of a Receiver of the U. S. Court, a telegraph company can acquire no title to its right of way by condemnation proceedings in a state court. *Id.*

3. RATIFICATION BY RECEIVER.—If the receiver ratifies a contract previously made with the company, the rights under such contract are not affected by the foreclosure proceedings. *Id.*

TENANTS IN COMMON.—*See* PATENTS, 4.

TOWN OFFICER—*See* MUNICIPAL CORPORATIONS.

1. MEASURE OF DAMAGES—REFUSAL TO PLACE JUDGMENT ON TAX LIST.—The highest damages which will be allowed in the United States Courts, against the Supervisors of a town for a refusal to put a judgment on the tax list, even though a mandamus shall have issued, will not exceed a counsel fee and costs. *Newark Institution vs. Panhorst*, 99.

WAGER CONTRACT.

1. CONTRACTS FOR FUTURE DELIVERY.—A contract for the delivery at a future time of personal property, which the seller has not on hand when the contract is made, nor any means of getting it, is not void for illegality. *Clarke vs. Foss*, 540.

2. SECRET INTENTION.—The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal. *Id.*

3. MUTUAL INTENT.—The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance, must be mutual, and constitute an integral part of the contract, in order to render it invalid. *Id.*

4. If the contracts were valid in their inception and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, by payment of differences, instead of by actual delivery, cannot make them void for illegality. *Id.*

5. Many authorities cited and commented upon. *Id.*

6. GAMING CONTRACT.—Contracts of sale that do not contemplate the actual *bona fide* delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time are gambling contracts, and the broker stands in no better position than the seller to recover differences. *In re Green*, 338.

7. NOTES VOID FOR WANT OF CONSIDERATION.—If there is no legal liability to pay a claim, notes given therefor are void for want of consideration. *Id.*

WAIVER—*See* ADMIRALTY, 1-5.

1. WAIVER.—The act of joining in a creditors' petition by a secured creditor, without reference to the security, is a waiver of such security. *In re Broich, et al.*, 303.

WARRANTS OF ATTORNEY—*See* BANKRUPTCY, 38.

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